Supreme Court, U.S.
FILED

021098 JAN 21 2003

OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

STEPHEN M. FLATOW,
Petitioner,

v.

ISLAMIC REPUBLIC OF IRAN
and
BANK SADERAT IRAN,
an agency or instrumentality of the Islamic Republic of Iran,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Of Counsel:
Professor Nelson Lund
3301 N. Fairfax Drive
Arlington, VA 22201
(703) 993-8045

21 January 2003

*Counsel of Record

Steven R. Perles*
PERLES LAW FIRM, P.C.
1615 New Hampshire Ave., NW
Suite 200
Washington, DC 20009
(202) 745-1300

Thomas Fortune Fay
601 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 589-1300

85 pp

QUESTION PRESENTED

Did the court below mistakenly apply the common law presumption of respect for the corporate form of juridically separate government instrumentalities, enunciated in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ["*Bancec*"], and thereby create an immediate and continuing obstacle to a statutory scheme through which Congress has sought to deter state-sponsored terrorism against American citizens?

PARTIES

Petitioner Stephen Flatow, a New Jersey native, is a United States citizen who lost his daughter, Alisa Flatow, to a bus bombing in Israel on April 9, 1995. Petitioner brings this action in his individual capacity as Alisa's father and as executor of her estate

Respondent Bank Saderat Iran is an Iranian corporation, organized under the banking laws of Iran as a banking corporation. Bank Saderat Iran was a private company from 1952 until 1979, at which time it was nationalized by the Islamic Republic of Iran.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 5

SUMMARY OF THE ARGUMENT 8

REASONS FOR GRANTING THE WRIT 9

I. Review by this Court is necessary to effectuate the Congressional policy of deterring terrorism through civil liability for state-sponsors of terrorism. 9

A. The Ninth Circuit's misapplication of the *Bancec* doctrine conflicts with Congress's anti-terrorism scheme 9

B. The nature, history, and purpose of the "state-sponsored terrorism exception," 28 U.S.C. §1605(a)(7), are fundamentally different from those of the "commercial activities exception," 28 U.S.C. § 1605(a)(2). 12

C. The court below mechanically applied the *Bancec* presumption despite the complete absence in this case of the policy concerns that motivated the Court's decision in *Bancec*. 17

TABLE OF CONTENTS
(Continued)

Page

D. The decision below encourages further acts of terrorism. 19

II. The Court should grant the writ because this case raises an issue closely related to the question presented by *Dole Food Co. v. Patrickson*, 122 S. Ct. 2657 (2002). 22

CONCLUSION 24

APPENDICES ..... attached

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Islamic Republic of Iran,
90 F. Supp. 2d 107 (D.D.C. 2000). 17 n.7

Anderson v. Abbot,
321 U.S. 349 (1944). ..... .10

Baglab Ltd. v. *Johnson Matthey Brothers*,
665 F. Supp. 289 (S.D.N.Y. 1987) 15 n.5

Berkey v. *Third Avenue Railway Co.*,
244 N.Y. 84, 94, 155 N.E. 58, 58 (1926) 19

Cronin v. Islamic Republic of Iran,
2002 WL 31830571 (D.D.C. 2002). 17 n.7

Dole Food Co. v. Patrickson,
122 S. Ct. 2657 (2002). 8, 22, 22 n.11

Eisenfield v. Islamic Republic of Iran,
172 F. Supp. 2d 1 (D.D.C. 2000). 17 n.7

Elahi v. Islamic Republic of Iran,
124 F. Supp. 2d 97 (D.D.C. 2000). 17 n.7

First National City Bank v. *Banco Para El Comercio Exterior de Cuba* ["*Bancec*"],
462 U.S. 611 (1983) ..... *passim*

Flatow v. Alavi Foundation,
No. 98-4152, 2000 WL 1012956
(4th Cir. July 24, 2000). 20, 23

Flatow v. Islamic Republic of Iran,
999 F. Supp 1 (D.D.C. 1998) 6, 10, 17 n.7

Flatow v. Islamic Republic of Iran,
308 F.3d 1065 (9th Cir. 2002). ..... .*passim*

Gabay v. Mostazafan Foundation of Iran,
151 F.R.D. 250, 251-52 (S.D.N.Y. 1993). 21 n.10

Gabay v. Mostazafan Foundation of Iran,
968 F.Supp. 895 (S.D.N.Y 1997). 21 n.10

Hester Int'l Corp. v. *Federal Republic of Nigeria*,
879 F.2d 170 (5th Cir. 1989) 15, 15 n.5

TABLE OF AUTHORITIES
(Continued)

Page

Cases (Continued)

Higgins v. Islamic Republic of Iran,
2000 WL 33674311 (D.D.C. 2000). 17 n.7

Letelier v. Republic of Chile
748 F.2d 790, 791 (2d Cir. 1984). 10, 11

The Schooner Exchange v. *M'Faddon*,
11 U.S. (7 Cranch) 116 (1812) 12

Stethem v. Islamic Republic of Iran,
201 F. Supp. 2d 78 (D.D.C. 2002). 17 n.7

Surette v. Islamic Republic of Iran,
2002 WL 31455114 (D.D.C. November 4, 2002). ...17 n.7

Sutherland v. Islamic Republic of Iran,
151 F. Supp. 2d 27 (D.D.C. 2001)..... 17 n.7

Verlinden, B.V. v. *Central Bank of Nigeria*,
461 U.S. 480 (1983) 12, 13

Wagner v. Islamic Republic of Iran,
172 F. Supp. 2d 128 (D.D.C. 2001).....17 n.7

Weinstein v. Islamic Republic of Iran,
184 F. Supp. 2d 13 (D.D.C. 2000) 17 n.7

Statutes and Legislative Materials

The Foreign Sovereign Immunities Act of 1976, *as amended*
28 U.S.C. §§ 1-330, 1602-1611 13

28 U.S.C. § 1603(b)..... 22

28 U.S.C. § 1605(a)(1)-(5) 13 n.3

28 U.S.C. § 1605(a)(2) 12, 14, 15, 16 n.6

28 U.S.C. § 1605(a)(6) 13 n.4

28 U.S.C. § 1605(a)(7) ..... *passim*

TABLE OF AUTHORITIES
(Continued)

Page

Statutes and Legislative Materials (Continued)

28 U.S.C. § 1605(b) 13 n.3

28 U.S.C. § 1607 ..... 13 n.3

28 U.S.C. § 1608(e) 18 n.7

28 U.S.C. § 1610(a)(2) 10, 16

28 U.S.C. § 1610 ..... 10, 19

28 U.S.C. § 1610(a)(7) 16

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. § 221, No. 104-132, 110 Stat. 1241 (1997)) 5, 10

1997 Omnibus Consolidated Appropriations Act, Pub.L. 104-208, §589, 110 Stat. 3009 ["Flatow Amendment"]. 5

Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, § 2002 (2000)..... 7 n.1

H. R. Rep. No. 94-1487, (1976) 14

H.R. Rep. 106-733 (2000) ..... .10

49 Fed. Reg. 2836-02 (January 23, 1984) 17

TABLE OF AUTHORITIES
(Continued)

Page

Miscellaneous

Letter from Jack B. Tate, Acting Legal Advisor, Dep't of State to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't of State Bulletin 984-85 (1952) *and in Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 711 (1976)..... 12 n.2

S. Jason Baletsa, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 U. Pa. L.Rev. 1247 (2000)..... 20 n.8

Ira Stoll, *Fifth Avenue Charity Is 'Totally Controlled' By Iran, NYPD Says*, New York Sun, (December 5, 2002). 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

STEPHEN M. FLATOW,
Petitioner,

v.

THE ISLAMIC REPUBLIC OF IRAN
and
BANK SADERAT IRAN,
an agency or instrumentality of the Islamic Republic of Iran,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Stephen Flatow respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on October 23, 2002.

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals for the Ninth Circuit (Bright, Fletcher, Fisher, opinion by Bright) is reported at 308 F.3d 1065, and is reprinted in the Appendix hereto at 41a.

The Memorandum Opinion of the United States District Court for the Southern District of California (Marilyn L. Huff) is unpublished, and is reprinted in the Appendix hereto at 38a.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2002. The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. §1254(l).

STATUTE INVOLVED

28 U.S.C. § 1603. Definitions

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country

28 U.S.C. §1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

. . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection

with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

. . .

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph--

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if--

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

. . .

28 U.S.C. § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

. . .

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

. . .

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or (7), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

. . .

STATEMENT OF THE CASE

On April 9, 1995, Petitioner Stephen Flatow's ("Flatow" or "Petitioner") 20-year old daughter, Alisa, her roommate and another American student left Jerusalem by bus for a brief holiday at a resort on Israel's southern Mediterranean coast. The bus was attacked by a Palestine Islamic Jihad suicide bomber, who drove a van loaded with explosives and shrapnel. This bombing was the first major terrorist attack in Israel after the signing of the 1993 Oslo Accords. Alisa died shortly after the bombing, from a fatal head wound.

In 1996, as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Congress amended the Foreign Sovereign Immunities Act ("FSIA") to create a judicial forum for adjudicating the claims of victims of terrorist acts committed by foreign states that the U.S. State Department has designated as state sponsors of terrorism. Pub. L. No. 104-132, § 221, 110 Stat. 1241 (1997). AEDPA created the "state-sponsored terrorism exception" to the sovereign immunity that is ordinarily enjoyed by foreign states under the FSIA. 28 U.S.C. § 1605(a)(7). Under AEDPA, countries officially designated by the Department of State as terrorist states can be held liable for personal injuries or deaths if the foreign state commits a terrorist act, or provides material support and resources to an individual or entity that commits such an act. *Id.*

Congress next addressed the issue of remedies for plaintiffs in these cases. A provision called "Civil Liability for Acts of State-Sponsored Terrorism" was enacted on September 30, 1996 as part of the 1997 Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 589, 110 Stat. 3009 (1997). This provision is commonly referred to as the "Flatow Amendment." The Flatow Amendment established the measure of damages available in suits under the "state-sponsored terrorism" provision of the FSIA.

After passage of the Flatow Amendment, Petitioner, as executor of Alisa's estate, filed a wrongful death complaint against the Islamic Republic of Iran ("Iran") and its officials on February 26, 1997, in the United States District Court for the District of Columbia. On March 11, 1998, the district court entered a default judgment against Iran in favor of Petitioner in the amount of $247,513,220. *See Flatow v. Islamic Republic of Iran,* 999 F. Supp. 1 (D.D.C. 1998).

Since then, Petitioner has aggressively sought to satisfy this final judgment, beginning with an attachment program against a wide array of Iranian government-owned assets. Pursuant to that program, Petitioner registered his judgment with the District Court for the Southern District of California on April 23, 1999. On September 14, 1999, Flatow obtained a writ of execution for $247,513,220, on property in Carlsbad, California, owned by the California Land Holding Company ("CLHC"), a wholly-owned subsidiary of Bank Saderat Iran ("BSI"). Because the CLHC was about to sell the property, Petitioner and BSI agreed that the writ of execution should be released from the property so that escrow could close. Pursuant to a consent order entered on October 1, 1999, the proceeds of the sale were held in an interest-bearing account subject to the lien created by the writ of execution.

On November 1, 1999, BSI filed a motion for release of the money held in the interest bearing account. On May 22, 2000, the district court denied BSI's motion without prejudice. The court found that the evidence Petitioner presented was not sufficient to overcome the presumption that BSI is a juridical entity separate and apart from the Islamic Republic of Iran, and that BSI was therefore not subject to execution of the judgment against Iran. In making this determination, the court applied the common law presumption of respect for corporate form recognized in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 629 (1983) (hereinafter "*Bancec*").

The court did, however, permit Petitioner to conduct discovery (until July 31, 2000) on the limited issue of whether Iran exercised "day-to-day control" over the operations of BSI. BSI then filed its renewed motion for release of the funds held pursuant to the consent order. Petitioner opposed that motion, arguing that BSI is "extensively controlled" by Iran because all Iranian banks, including BSI, were nationalized following the 1979 revolution. The district court, however, concluded that this evidence did not show that Iran exerts day-to-day control over BSI as required by that court's interpretation of *Bancec*. (App. at 39a). (citing *Bancec*, 462 U.S. at 629-31). The district court also rejected Petitioner's alternative argument under *Bancec's* fraud or injustice exception. (App. at 40a).

On August 24, 2000, Flatow timely appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the district court's decision on October 23, 2002. (App. at 41a). The Ninth Circuit accepted the lower court's finding that BSI was formally constituted as a separate juridical entity and, therefore, was entitled to the *Bancec* presumption.[1] (App. at 48a). The Ninth Circuit also agreed that the *Bancec* presumption could not be overcome because Iran's supervision over BSI did not constitute "day to day control."

---

[1] The United States filed a Statement of Interest in the court below, suggesting that Petitioner relinquished his right to attach the asset at dispute in this case when he agreed to a payment under the Victims of Trafficking and Violence Protection Act of 2000 § 2002, Pub. L. No. 106-386, 114 Stat. 1464, 1541-1543 (2000). We believe that this suggestion was unfounded, and that it is inconsistent with an earlier Statement of Interest filed by the United States in the district court in this case. In any event, neither the district court nor the Ninth Circuit addressed this issue, and it will not be an issue in this Court if our petition for certiorari is granted.

(App. at 48a). The Ninth Circuit rejected Petitioner's argument that the *Bancec* presumption can be overcome by Iran's sole ownership of BSI's operating capital, by the nationalization of Iranian banks, and by the Iranian Constitution's formal recognition of this ownership. *Id.* Flatow filed this petition for writ of certiorari on January 21, 2003.

SUMMARY OF THE ARGUMENT

Review by this Court is necessary to prevent the frustration of Congress's careful and measured effort to deter state-sponsored terrorism. The deterrence of state-sponsored terrorism is a question of vital national importance, and that deterrent effect is seriously and *immediately* threatened by a conflict between federal statutory law and the Ninth Circuit's misapplication of the common law *Bancec* doctrine. This Court created the *Bancec* doctrine to address the liabilities of separate juridical foreign government entities in a *commercial* setting. Applying the *Bancec* doctrine to protect assets belonging to a party that has been found liable for heinous acts of terrorism contradicts both the policies Congress has selected to deter state-sponsors of terrorism and the *Bancec* opinion itself. The Court's definitive guidance at this critical juncture can minimize the damage already inflicted upon Congress's legislative scheme, and prevent other courts from following the Ninth Circuit's lead.

Moreover, the Court should grant certiorari in this case because the issue presented here is closely related to the question presented in *Dole Food Co. v. Patrickson*, 122 S. Ct. 2657 (2002) (granting a writ of certiorari on the issue of "tiered corporations" under the FSIA). In this case, the actual owner of the property in question was CLHC, a wholly-owned subsidiary of BSI, and thus a "tiered corporation." If a "tiered corporation" such as CLHC cannot be considered a foreign state instrumentality, an avenue is created that will allow foreign state sponsors of terrorism to invest in this

country without fearing that they may have to satisfy their obligations owed due to final judgments obtained under 28 U.S.C. § 1605(a)(7). When the Court resolves the *Dole Food Co.* question, it should consider the ramifications in the area of litigation involving state-sponsored terrorism, and to that end should grant this writ.

REASONS FOR GRANTING THE WRIT

I. Review by this Court is necessary to effectuate the Congressional policy of deterring terrorism through civil liability for state-sponsors of terrorism.

The decision below threatens to emasculate an important part of Congress's policy for the war on terrorism, a national issue of vital importance. Moreover, the damage caused by the decision below is immediate and ongoing because it undermines the deterrent effect that Congress sought to create. The growing number of cases resulting from acts of state-sponsored terrorism almost guarantees repeated conflict between the congressional scheme and the improper application of the *Bancec* presumption. If the decision below is allowed to stand, it will frustrate Congress's effort to deter state-sponsors of terrorism. Instead, *victims* will be deterred from bringing suits of the type that Congress deliberately sought to encourage.

A. The Ninth Circuit's misapplication of the *Bancec* doctrine conflicts with Congress's anti-terrorism scheme.

Bancec enunciated an equitable, common law principle under which duly created instrumentalities of a foreign state are ordinarily entitled to a presumption of independent status. *Bancec* also made it clear, however, that this presumption must not be used to undermine countervailing congressional policies. "In particular, the Court has consistently refused to

where it is interposed to defeat legislative policies." *Bancec*, 462 U.S. at 630 (citing *Anderson v. Abbot*, 321 U.S. 349, 362-63(1944)). Congress enacted both the "state-sponsored terrorism exception" to the FSIA and the Flatow Amendment in order to deter state-sponsored terrorism. *See Flatow*, 999 F. Supp. at 12, 25. The "state-sponsored terrorism" exception, however, "was enacted explicitly with the intent to alter the conduct of foreign states, particularly towards United States nationals traveling abroad." *Id.* The Flatow Amendment, in turn, sought to achieve deterrence by increasing the damages available for plaintiffs suing foreign state sponsors of terrorism. *Flatow*, 999 F. Supp. at 12-13. Congress intended to create massive civil liability for proven state sponsors of terrorism under 28 U.S.C. § 1605(a)(7) as a way of altering their behavior. H.R. Rep. 106-733, at 25 (2000).

In 1996, when Congress amended 28 U.S.C. § 1605 to include the "state-sponsored terrorism exception" to foreign sovereign immunity, it also amended 28 U.S.C. § 1610 to permit attachment of assets irrespective of the assets' involvement in the underlying incident that provided the right for attachment. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 221, 110 Stat. 1241 (*codified at* 28 U.S.C. § 1610 (1997)). These amendments were intended to ease the process of attachment and execution for 28 U.S.C. § 1605(a)(7) judgment creditors. Prior to the amendments, victims of state-sponsored terrorism who obtained judgments under the then-existing provisions of the FSIA could not attach or execute upon the assets owned by the foreign state, unless they could prove the asset sought for execution or attachment was involved in the underlying incident. 28 U.S.C. § 1610(a)(2).

The harsh limitations this requirement placed upon successful plaintiffs' ability to satisfy their outstanding judgments was illustrated in *Letelier v. Republic of Chile*, 748 F.2d 790, 791 (2d Cir. 1984). In *Letelier*, the victims of a

bombing and assassination, sponsored by Chile and carried out in the United States, sought to execute upon the Chilean national airline, Linea Aerea Nacional-Chile ("LAN"), to satisfy their default judgment against Chile. *Id.* at 792. The court found that the property was not used for the commercial activity upon which the claim was based and denied execution against LAN. *Id.* at 795-98. In doing do, the court made clear the reason for its ruling: "Congress did not provide for execution against a foreign state's property under the circumstances of this case. Congress provided for execution against property used in commercial activity upon which the claim is based." *Id.* at 799. The 1996 amendment to 28 U.S.C. § 1610 ensures that victims of terrorism with outstanding 28 U.S.C. § 1605(a)(7) judgments do not fall into the *Letelier* trap.

The court below formulated federal common law rules regarding the attribution of liability under the FSIA that defeat the congressional intent behind its anti-terrorism legislation. Congress has decided that financial penalties shall be exacted upon those foreign states that sponsor acts of terrorism against United States citizens, and Congress has deliberately constructed a legislative scheme to fulfill its goal of deterrence. The court below mechanically construed *Bancec* to block the attachment of assets otherwise available to satisfy outstanding judgments resulting from litigation that Congress has specifically sought to encourage, and thus upset Congress's carefully crafted scheme.

Common law rules that create obstacles to attachment and execution of final judgments awarded under this legislation do more than undermine the integrity of Congress's legislative scheme. As discussed in section I.D below, foreign state-sponsors of terrorism will be emboldened if they know that there are simple methods of erecting insuperable obstacles against judgment creditors who prevailed under the "state-sponsored terrorism"

provision of the FSIA, 28 U.S.C. § 1605(a)(7). This Court should not permit that to happen.

B. The nature, history and purpose of the "state sponsored terrorism exception" to sovereign immunity, 28 U.S.C. § 1605(a)(7), are fundamentally different from those of the older "commercial activities exception," 28 U.S.C. § 1605(a)(2).

In applying *Bancec*, the court below adopted a "day-to-day control" test developed by other courts under the rubric of a *different* statutory provision: the FSIA's "commercial activities exception" to sovereign immunity, 28 U.S.C. § 1605(a)(2). This was a serious mistake because the history and purposes of the two exceptions are quite different. The "day-to-day control" test is completely incongruous when applied to cases arising under the "state sponsored terrorism exception," found in 28 U.S.C. §1605(a)(7).

From early on, federal common law generally provided foreign states with absolute immunity from suit. *See, e.g., The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). With the rise of state trading companies in the twentieth century, exceptions began to be made under a theory of "restrictive immunity," which was formally adopted as United States policy by the Department of State in the so-called Tate Letter of May 1952.[2] *See Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-87 (1983). Under this theory, immunity was confined to suits involving the foreign sovereign's public acts, and did not extend to cases

---

[2] Letter from Jack B. Tate, Acting Legal Advisor, Department of State to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Department of State Bulletin 984-85 (1952) *and in Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 711 (1976) (Appendix 2 to opinion of White, J.)

arising out of a foreign state's strictly commercial acts. *Id.* at 487.

Administration of the restrictive-immunity theory proved problematic. Courts deferred to State Department recommendations on immunity questions, which forced this executive agency to assume a judicial function that often conflicted with its primary mission of conducting American foreign policy: foreign nations frequently pressured the State Department to recommend immunity, and political considerations sometimes led to recommendations of immunity in cases where immunity would not have been available under the restrictive theory. *Id.* The State Department, moreover, did not participate in every case, which left the courts to make their own decisions in that class of cases. As a result, "the governing standards were neither clear nor uniformly applied." *Id.* at 488 (citations omitted).

In 1976, Congress responded to these problems by enacting the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602-1611, which specified seven exceptions to the general rule of immunity for foreign states (including the "commercial activities exception"), and assigned the interpretation of those exceptions to the courts.[3] Subsequent amendments added two additional exceptions to the general rule (including the 1996 addition of the "state-sponsored terrorism exception").[4]

---

[3] The originally enacted exceptions to immunity of foreign states from the courts of the United States were waiver, commercial activity, expropriation, gifts in immovable property in the United States, torts occurring within the United States, 28 U.S.C. § 1605(a)(1)-(5), suits in admiralty to enforce maritime liens, 28 U.S.C. § 1605(b), and counterclaims against foreign state plaintiffs, 28 U.S.C. § 1607.

[4] In 1988, Congress added an exception to immunity for actions to enforce arbitration agreements and awards. 28 U.S.C. § 1605(a)(6). In 1996, Congress added the "state sponsored terrorism exception" to immunity for actions

The frequently litigated "commercial activities exception," 28 U.S.C. §1605(a)(2), has its origin in the theory of restrictive immunity, with its distinction between sovereign acts and strictly commercial acts. H.R. Rep. No. 94-1487, at 6-7, (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06. The fundamental principle, which had been recognized in the Tate Letter, is that when a foreign state enters the American market as a commercial actor, it should to that extent be treated like other commercial entities. Accordingly, the statute deprives a foreign sovereign of immunity in those cases:

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. §1605(a)(2).

In applying this provision to cases in which the commercial activity was carried on by an entity that is juridically separate from the foreign state, courts have understandably been respectful of the corporate form and correspondingly reluctant to attribute to foreign sovereigns the activities of commercial entities created by those sovereigns. As this Court explained in *Bancec*, it is increasingly common and perfectly legitimate for governments to establish separate governmental corporations designed to pursue a variety of commercial activities. 462 U.S. at 624-27.

---

arising from a foreign state's acts of torture, extrajudicial killing, hostage-taking, aircraft sabotage or material support for such an act which results in the injury or death of United States nationals. 28 U.S.C. § 1605(a)(7).

While it is clearly important to avoid treating foreign sovereigns worse than private incorporators, Congress also recognized that foreign sovereigns should not be free to abuse the corporate form. The FSIA's "commercial activities exception" to the general rule of foreign sovereign immunity strikes this balance by subjecting foreign states to U.S. jurisdiction for their own commercial activities, but not for those of genuinely independent government corporations. In deciding whether a juridically separate entity is in fact the state itself, the lower courts have sometimes applied a test that asks whether the foreign state exercised "day-to-day control" over the activities of the juridically separate entity.[5]

This test, which is broadly consistent with analogous rules in American corporate law, *see, e.g., Hester Int'l Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170, 177-78 (5th Cir. 1989), has an obvious appeal in light of the purpose and history of the "commercial activities exception." In establishing a separate corporation to pursue specific commercial activities, a foreign government is making trade-offs similar to those that an American corporation makes when it establishes an independent subsidiary. There being no obvious reason for applying different rules of attribution in these two highly analogous situations, courts have been inclined to treat them alike.

The legislative intent behind 28 U.S.C. § 1605(a)(7), the "state-sponsored terrorism" exception, however, is quite different from that underlying 28 U.S.C. § 1605(a)(2), the "commercial activities exception." The difference is illustrated, for example, by the explicit and profound difference between the corresponding provisions for attachment in aid of execution. When the claim is brought

---

[5] *See, e.g., Hester Int'l Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170, 178 (5th Cir. 1989); *Baglab Ltd.* v. *Johnson Matthey Brothers*, 665 F. Supp. 289, 297 (S.D.N.Y. 1987).

under the "state-sponsored terrorism exception," judgment creditors do not have to prove that property sought for attachment in aid of execution was involved in the underlying claim. 28 U.S.C. § 1610(a)(7). This stands in contrast to judgment creditors holding a judgment from a claim under the "commercial activities exception," who are required by statute to prove that the asset sought for attachment in aid of execution was involved in the commercial activity that their underlying claim was based on. 28 U.S.C. § 1610(a)(2).

Whatever justification there is for the "day-to-day control" test under the FSIA's "commercial activities exception," it has no justification whatsoever under the "state-sponsored terrorism exception" that is at issue in this case.[6] Unlike the "commercial activities exception," the statutory provision at issue in this case cannot be regarded as a device for facilitating legitimate commercial intercourse among the community of nations. While the "commercial activities" exception represents the codification of the restrictive doctrine of immunity, the "state-sponsored terrorism" exception is not based on the restrictive theory, and instead denies immunity for the indisputably 'sovereign' act of waging war or conducting a violent foreign policy. The purpose of the "state-sponsored terrorism exception," quite unlike that of the "commercial activities exception," is to penalize foreign states for grossly unacceptable conduct against American citizens.

---

[6] We do not necessarily endorse the "day-to-day control" test for all cases arising under the "commercial activities exception." The proper interpretation of 28 U.S.C. § 1605(a)(2) is not raised by this petition for certiorari, and our point here is only that the "day-to-day control" test is clearly *not* appropriate under the "state-sponsored terrorism exception," whatever its merits may be elsewhere.

C. The court below mechanically applied the *Bancec* presumption despite the complete absence in this case of the policy concerns that motivated the Court's decision in *Bancec*.

This Court recognized in *Bancec*: (1) that foreign sovereigns are presumed to be separate from juridically independent entities that they control; and (2) that this presumption can be overcome. *Bancec*, 462 U.S. at 628-29. The *Bancec* presumption is based upon "[d]ue respect for the actions taken by foreign sovereigns and for principles of comity between nations." *Id.* at 626. This entirely legitimate concern, however, cannot dominate the interpretation of the "state-sponsored terrorism exception" at issue in this case. The State Department has identified Iran as a state-sponsor of terrorist activities against the United States, 49 Fed. Reg. 2836-02 (January 23, 1984), and it has repeatedly been proven in open court that Iran sponsors groups that kill and injure United States citizens.[7]

---

[7] *Cronin v. Islamic Republic of Iran*, 2002 WL 31830571 (D.D.C. 2002); *Surette v. Islamic Republic of Iran*, 2002 WL 31455114 (D.D.C. November 4, 2002); *Stethem v. Islamic Republic of Iran*, 201 F. Supp. 2d 78 (D.D.C. 2002); *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128 (D.D.C. 2001); *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27 (D.D.C. 2001); *Higgins v. Islamic Republic of Iran*, 2000 WL 33674311 (D.D.C. 2000); *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13 (D.D.C. 2000); *Eisenfield v. Islamic Republic of Iran*, 172 F. Supp. 2d 1 (D.D.C. 2000); *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97 (D.D.C. 2000); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107 (D.D.C. 2000); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998). While Iran has consistently refused to recognize the jurisdiction of United States courts over it when the suit pertains to a 28 U.S.C. § 1605(a)(7) "state-sponsored terrorism" claim, under the FSIA, a classic default judgment does not result if a foreign sovereign or its instrumentality fails or refuses to appear in court. "No judgment by default shall be entered by

The *Bancec* Court's concern that ignoring the separate status of a sovereign government and its instrumentalities would divert third party credit from foreign governments struggling to fund economic enterprise abroad also motivated its ruling. *Bancec*, 462 U.S. at 625-26. Where Congress's legislative goal is to economically *penalize* foreign state-sponsors of terrorism, however, it simply makes no sense to apply a common law rule whose purpose is to *protect* the legitimate economic interests of foreign governments. Indeed, applying a common law rule so as to avoid such penalties is flatly inconsistent with Congress's legislative goals.

The *Bancec* Court also ruled that the common law presumption it recognized could be overcome, and the Court stressed that there can be no "mechanical formula" for deciding when the presumption should be overcome. 462 U.S. at 633-34. "[T]he principles governing this case are common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies." *Id.* at 623. The court below ignored *Bancec*'s central teaching when it ruled that Petitioner could not overcome the presumption of independence in this case. (App. at 49a). This unfortunate result was aptly diagnosed in *Bancec* itself: "The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they often end by enslaving it." 462 U.S. at 623

---

a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e).

(quoting *Berkey v. Third Avenue Railway Co.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926) (Cardozo, J.)).

The mechanical application that produced the result below turns *Bancec* on its head and creates extremely bad precedent that will undermine the deterrent effect that litigation like Petitioner's would otherwise have on state sponsors of terrorism. If the rule applied below had been dictated by Congress, it would be shocking and regrettable, but we would have to abide by it. Far from being dictated by Congress, however, the ruling below actually contradicts Congress's policy for the war on terrorism, as reflected in the "state-sponsored terrorism exception" to the FSIA, the Flatow Amendment, and the 1996 amendments to 28 U.S.C. § 1610. This mistake by the court below threatens to undermine important congressional purposes, as explained in the previous section, and should be corrected by this Court before the congressional policy of deterrence is undermined any further.

D. The decision below encourages further acts of terrorism.

The practical effect of the ruling below is both profound and immediate. State sponsors of terrorism are emboldened when Congress's response is seen as an empty threat.[8] Misapplication of the *Bancec* doctrine allows these foreign states to invest and litigate in the United States, before the eyes of their victims, even those victims with valid final outstanding judgments against those foreign states. If there is

---

[8] Iran has closely followed the development of the legislative scheme enacted by Congress and the resulting court cases. Members of Iran's Foreign Ministry have publicly vented their disagreement with the 28 U.S.C. § 1605(a)(7) verdicts. *See* S. Jason Baletsa, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 U. Pa. L.Rev. 1247, 1284 n.221 (2000).

no hope of satisfying a final judgment, potential plaintiffs will be deterred from bringing suit against state-sponsors of terrorist acts, even if they have sufficient proof that these states were guilty of the terrorist act.

The case of *Flatow v. Alavi Foundation*, No. 98-4152, 2000 WL 1012956 (4th Cir. July 24, 2000), illustrates the consequences that arise when our courts extend "due respect for the actions taken by foreign sovereigns and for principles of comity between nations"[9] to foreign states that sponsor acts of terrorism against United States citizens.

The Alavi Foundation is currently the object of widespread media coverage because of statements made by David Cohen, currently the New York Police Department's deputy commissioner for intelligence and a 35-year veteran of the CIA. Mr. Cohen, who was the CIA's deputy director for operations from 1995 to 1997 and the deputy director of the CIA's directorate of intelligence from 1991 to 1995, reportedly filed an affidavit on September 12, 2002, under penalty of perjury, in a federal court proceeding. In a section of the declaration headed "terrorist activity," the declaration states: "The Alavi Foundation is a non-profit charitable organization ostensibly run by an independent board of directors but totally controlled by the government of Iran. The foundation has assets of about $100,000,000 in the U.S. and an annual income of between $10-15 million. The foundation funds a variety of anti-American causes, including the four Islamic education centers it owns in New York, Maryland, Texas and California." Ira Stoll, *Fifth Avenue Charity Is 'Totally Controlled' By Iran, NYPD Says,* New York Sun, (December 5, 2002).

---

[9] *Bancec*, 462 U.S. at 626.

In 1998, Flatow attempted to execute against the Alavi Foundation,[10] a New York not-for-profit corporation controlled by Iran, to satisfy his outstanding 28 USC § 1605(a)(7) judgment against Iran. *Flatow v. Alavi Foundation*, No. 98-4152, 2000 WL 1012956 at *1 (4th Cir. July 24, 2000). The court ruled that the *Bancec* presumption could not be overcome, and Flatow's attempts to levy against real property held by the Alavi Foundation were frustrated. *Id.* at *6-7. Congressional intent was also frustrated, and the Alavi Foundation continues its activities unabated, to the despair of law enforcement officials in New York City.

In this case, BSI is wholly owned by Iran and all of BSI's profits will go to Iran, yet BSI is able to litigate and do business in the United States, and Iran never has to worry that BSI assets will be attached or executed upon to satisfy any portion of the outstanding judgments obtained under the "state-sponsored terrorism" provision of the FSIA, 28 U.S.C. § 1605(a)(7). Thus, the *Bancec* presumption, as the court misapplied it below, inevitably operates to defeat Congress's intent. Foreign state-sponsors of terrorism can easily sidestep Congress's entire legislative scheme simply by declining to enter an appearance in the proceedings brought by victims of terrorism under 28 U.S.C. § 1605(a)(7).

---

[10] In 1973, the Pahlavi Foundation in Iran had established a branch office in Manhattan, incorporated under the laws of the State of New York as the Pahlavi Foundation. *Gabay v. Mostazafan Foundation of Iran*, 968 F. Supp. 895, 896 (S.D.N.Y. 1997). At approximately the same time that the Mostazafan Foundation of Iran assumed control of the Pahlavi Foundation in Iran, the directors of the Pahlavi Foundation in New York met in Tehran and changed the Foundation's name to the Mostazafan Foundation of New York. *See Gabay v. Mostazafan Foundation of Iran*, 151 F.R.D. 250, 251-52 (S.D.N.Y. 1993). In 1992, the Mostazafan Foundation of New York changed its name to the Alavi Foundation. *See id.* at 251.

II. The Court should grant the writ because this case raises an issue closely related to the question presented by *Dole Food Co. v. Patrickson*, 122 S. Ct. 2657 (2002).

When Petitioner executed writs of attachment against the property at issue in this case, the assets belonged to the CLHC. The CLHC is wholly owned by BSI, which is not a foreign state or a political subdivision thereof. Today, there exists a split among the courts of appeals on whether a "tiered corporation" like CLCH is eligible for foreign sovereign immunity under the FSIA. This issue is now before the Court in *Dole Food Co. v. Patrickson*, 122 S. Ct. 2657 (2002).[11]

This Court's decision in *Dole Food Co.* could have serious ramifications for Congress's policy of deterring terrorism by authorizing civil litigation against terrorist states. If the Court concludes, without more, that a "tiered corporation" such as CLHC is not an "agency or instrumentality of a foreign state" under 28 U.S.C. § 1603(b), it might imply that foreign state sponsors of terrorism can create corporate structures, analogous to the one in this case, for the sole purpose of evading the mechanisms Congress has established for the attachment or execution of foreign-owned assets in satisfaction of outstanding judgments under the

---

[11] In *Dole Food Co.*, the Court granted a petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit on the following questions: "1. Whether a corporation is an "agency or instrumentality" if a foreign state owns a majority of the shares of a corporate enterprise that in turn owns a majority of the shares of the corporation. 2. Whether a corporation is an "agency or instrumentality" if a foreign state owned a majority of the shares of the corporation at the time of the events giving rise to litigation, but the foreign state does not own a majority of those shares at the time that a plaintiff commences a suit against the corporation." 122 S. Ct. 2657 (2002).

"state sponsored terrorism" provision of the FSIA, 28 U.S.C. § 1605(a)(7).

Iran, for example, has adopted a litigation strategy that minimizes its exposure to Congress's deterrence mechanism. Iran has never appeared before a United States district court to defend itself in a 28 U.S.C. § 1605(a)(7) "state-sponsored terrorism" lawsuit under the FSIA, thus permitting it to claim that it has never recognized the jurisdiction of our courts in these proceedings. As the present case illustrates, however, Iran does appear to vigorously defend against attachment and execution proceedings. This leaves 28 U.S.C. § 1605(a)(7) judgment-creditors with few options in their search for assets that can satisfy their final judgments and thereby effectuate Congress's anti-terrorism policy. Practically the only route to satisfaction of these final judgments lies in finding Iranian assets in this country. This route will be greatly complicated, or even eliminated, if the FSIA does not permit attachment of the property of "tiered corporations."

The danger of unduly restricting the reach of the FSIA is illustrated by *Flatow v. Alavi Foundation*, No. 98-4152, 2000 WL 1012956 (4th Cir. July 24, 2000). In that case, Flatow attempted to enforce his outstanding 28 USC § 1605(a)(7) judgment against property owned by the Alavi Foundation. The court concluded that the Alavi Foundation was not a foreign state or an instrumentality of a foreign state under the FSIA. *Id.* at *4-5. Accordingly, Flatow was unable to employ the attachment machinery codified in 28 U.S.C. § 1610 against the Alavi Foundation. If "tiered corporations" are considered completely outside the provisions of the FSIA, then 28 U.S.C. § 1605(a)(7) judgment creditors may never be able to look to "tiered corporations" to satisfy their outstanding judgments. Moreover, foreign state-sponsors of terror would be invited to create a tiered corporate structure to erect a safe harbor, impervious to the attachment mechanisms of the FSIA. This Court should give full

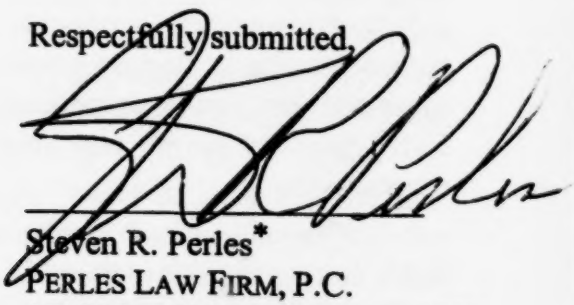
consideration to the effect that its decision in *Dole Food Co.* may have in the context of lawsuits arising from state sponsored terrorism, and to that end should grant the writ in this case.

CONCLUSION

Due to the pressing and vital national significance of the question presented in this petition, the Court should grant plenary review and set the case for briefing and argument.

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari.

Respectfully submitted,



Steven R. Perles*
PERLES LAW FIRM, P.C.
1615 New Hampshire Ave., N.W.
Suite 200
Washington, DC 20009
(202) 745-1300

Thomas Fortune Fay
D.C. Bar No. 23929
601 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 589-1300

Of Counsel:
Professor Nelson Lund
3301 N. Fairfax Drive
Arlington, VA 22201
(703) 993-8045

21 January 2003

*Counsel of Record

INDEX TO APPENDICES

Page

APPENDIX A

Consent Order of United States District Court for the Southern District of California.....1a

APPENDIX B

Order of United States District Court for the Southern District of California to confirm the appointment of Victor Holm as a Commissioner of the Court for the purpose of taking testimony abroad.....4a

APPENDIX C

Order of United States District Court for the Southern District of California denying plaintiff's motion for condemnation of assets of judgment-debtor (Docket #14, 26) permitting withdrawal of BSI's motion for satisfaction (Docket #18, 19) denying plaintiff's motion for order to show cause as to judgment-debtor (Docket #47) denying without prejudice BSI's motion for release of funds held pursuant to consent order (Docket #8).....5a

APPENDIX D

Request for international judicial assistance pursuant to the Hague Convention of 18 March 1970 on the taking of evidence abroad civil or commercial matters.....29a

INDEX TO APPENDICES
(CONTINUED)

APPENDIX E

Order of United States District Court for the Southern District of California for denying plaintiff's request for international assistance pursuant to the Hague Convention on the Taking of Evidence Abroad and granting BSI's motion for a protective order.....32a

APPENDIX F

Order of United States District Court for the Southern District of California for granting renewed motion by claimant Bank Saderat Iran for release of money held pursuant to consent order of October 1, 1999 (Docket #72) and termination case.....38a

APPENDIX G

Opinion by the United States Court of Appeals for the Ninth Circuit, *Flatow v. Islamic Republic Iran*, 308 F.3d 1065 (9th Cir. 2002).....41a

APPENDIX A

United States District Court for the Southern District of California

99-MC-250

Stephen M. Flatow,
Plaintiff,
v.
The Islamic Republic of Iran, et al,
Defendant

CONSENT ORDER

It appearing that that a judgment was entered in the United States District Court For The District Of Columbia on March 11, 1998 for the Plaintiff, Stephen M. Flatow, and against the defendant, The Islamic Republic of Iran, which judgment was thereafter registered in this Court in accordance with the provisions of 28 United States Code Section 1963.

It further appearing that a writ of execution was issued upon said judgment attaching property alleged to be owned by California Land Holding Corporation, a wholly owned subsidiary of Bank Saderat Iran, an instrumentality of the Defendant, The Islamic Republic Of Iran, consisting of lot numbers 407, 408 and 410, tract 6905, La Costa Meadows No. 2, located on Santa Isabel Street between Alga and El Fuerte Streets, Carlsbad, California 92008, and the property was thereafter levied upon in accordance with said writ.

It further appears that the Islamic Republic of Iran, et al, Defendants, Bank Saderat Iran, and California Land Holding Corporation contest the validity of the judgment, the writ of execution, and the levy of the writ on the property.

It further appearing that the property referred to was, at the time of levy, subject to a sales contract and the parties to this action and the parties to the sales contract for the above referred to property wish the settlement on said contract on the above property to proceed, with the lien of judgment to attach to the net proceeds of sale, it is, by the Court, with the agreement of both the parties to this litigation and the parties to the contract for sale of the property, this 1st day of October, 1999.

ORDERED, that the parties to the sales contract for the sale of the property may complete settlement upon that contract, with the net proceeds of the sale, less closing costs, broker's commissions, title insurance and any other normal and necessary costs, to be deposited in an interest bearing bank account with the requirement that withdrawals are to be made only pursuant by Order of this Court, and not otherwise, and it is further

ORDERED, that the lien created by service of the writ of execution shall, upon settlement, attach to the net proceeds, and it is further

ORDERED, that upon deposit of the net proceeds in a bank account, as described above, the writ of execution issued upon the judgment attaching the real property above referred to shall be discharged and Lots 407, 408, and 410, Tract 6905, La Costa Meadows No. 2, located on Santa Isabel Street, between Alga and El Fuerta Streets Carlsbad, California 92008, shall be free and clear of the lien created by the writ of execution, and it is further

ORDERED, that upon deposits of the net proceeds, Counsel for the Plaintiff, Stephen M. Flatow, shall forthwith file in this Court a praecipe certifying that the net proceeds have been deposited and the real property above described is free and clear of the lien arising by virtue of the writ of execution, and it is further

ORDERED, that this Order and the agreement of the parties to entry of the order shall not be construed as an admission or waiver of any rights by any of the parties and is without prejudice to any rights of the parties to the agreement to contest any matter concerning the writ of execution, any lien arising therefrom, the underlying judgment or to enforcement of the writ

upon the property or net proceeds and the parties shall have thirty days from the date of this Order to file any brief contesting the validity of the writ of execution, any lien arising therefrom or its levy against the property or against the net proceeds.

Dated: October 1, 1999

By {Signature}

MARILYN L. HUFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX B

United States District Court for the Southern District of California

99-MC-250

Stephen M. Flatow,
Plaintiff,
v.
The Islamic Republic of Iran, et al,
Defendant

ORDER

Upon the request of the Plaintiff to confirm the appointment of victor Holm as a Commissioner of the Court for the purpose of taking testimony abroad, it is this ___day of March, 2000

ORDERED that Victor Holm, residing at 10414 Burnt Ember Drive, Silver Spring, MD 20903, be and hereby is appointed as a Commissioner of this Court pursuant to Fed.R.Civ.P. 28(b) for the purposes of administering oaths and taking testimony abroad in the above-captioned matter.

SO ORDERED

_____

MARILIN L. HUFF
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

APPENDIX C

United States District Court for the Southern District of California

99-MC-250

Stephen M. Flatow,

Plaintiff,

v.

The Islamic Republic of Iran, et al,

Defendant

ORDER DENYING PLAINTIFF'S MOTION FOR CONDEMNATION OF ASSETS OF JUDGMENT-DEBTOR (DOCKET #14, 26) PERMITTING WITHDRAWAL OF BSI'S MOTION FOR SANCTIONS (DOCKET #18, 19) DENYING PLAINTIFF'S MOTION FOR ORDER TO SHOW CAUSE AS TO JUDGMENT-DEBTOR (DOCKET #47) DENYING WITHOUT PREJUDICE BSI'S MOTION FOR RELEASE OF FUNDS HELD PURSUANT TO CONSENT ORDER (DOCKET #8)

On March 11, 1998, the United States District Court for the District of Columbia entered a default judgment against the Islamic Republic of Iran and in favor of plaintiff Stephen Flatow for $247,513,220.00 in damages for the death of Alisa Flatow. Mr. Flatow registered the judgment in this Court on April 23, 1999. On September 14, 1999, he obtained a writ of execution in the amount of $247,513,200.00. Mr. Flatow requests that this Court execute on assets belonging to a non-party, Bank Saderat Iran, in order to satisfy Mr. Flatow's judgment. On February 28, 2000, the Court heard oral argument. Thomas Fortune Fay and Jane Carol Norman

appeared fro plaintiff and Steven William Kerekes appeared for defendant. At the oral argument, Mr. Kerekes withdrew defendant's motion for sanctions. The Court will permit withdrawal of the motion for sanctions. For the reasons stated below, the Court denies plaintiff's request for condemnation of assets of the Bank Saderat Iran. Although the Court's preliminary finding is that Iran does not assert sufficient day-to-day control over BSI as required for the Court to treat BSI as an agency or instrumentality of Iran, the Court will grant plaintiff's request to conduct discovery on this issue. The parties may conduct discovery on the question of Iran's control over BSI until July 10, 2000. The Court denies without prejudice BSI's motion for release of funds. The Court sets a hearing date August 14, 2000 for BSI to renew its motion for release of the funds held pursuant to the consent order.

BACKGROUND

On April 9, 1995, Alisa Flatow, a collage student spending a semester studying in Israel, was killed in an explosion when the bus on which she was traveling collided with a van loaded with explosives. The State Department later concluded that "Palestine Islamic Jihad" had committed the bombing. The State Department also determined that the Islamic Republic of Iran provides material support and resources to the "Palestine Islamic Jihad." The Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), effective April 24, 1996, amended the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-1611 to include a provision that allowed individuals to sue foreign states designated as state sponsors of terrorism for money damages for death that was caused by an act of extrajudicial killing, if the act was engaged in by an agent of the foreign state while acting within the scope of his or her employment. See 28 U.S.C. §1605(a)(7).

On February 26, 1997, Mr. Flatow as Alisa's father and executor of her estate, filed a wrongful death suit against Iran and its officials in the United States District Court for the District of Columbia pursuant to 28 U.S.C. §1605(a)(7). Iran did not appear. On March 11, 1998, pursuant to 28 U.S.C. §1605(a)(7), Judge Lamberth awarded a default judgment of $247,513,220.00 against Iran, which consisted of $1,513,220.00 in funeral expenses and loss of accretions to the estate of Alisa Flatow, $1 million for

decedent's pain and suffering, a total of $20 million distributed to various family members for loss of consolidation, and $225 million in punitive damages. See Flatow v. Islamic Republic of Iran, 999 F.Supp. 1, 5 (D.D.C. 1998). This was the first judgment to hold a foreign state and its high officials responsible for an act of terrorism under the AEDPA and the Foreign Sovereign Immunities Act. In this proceeding before Judge Lamberth, Mr. Flatow has attempted to collect on the judgment by executing a writ of attachment against funds held by the United States treasury's Judgments und intended to satisfy an award in favor of Iran issued by the Iran-United States Claims Tribunal. See Flatow v. Islamic Republic of Iran, District Court of Columbia, CA No. 97-396 RCL. The government has opposed Mr. Flatow's efforts to satisfy the judgment by attaching funds held by the United States Treasury. On November 15, 1999, Judge Lamberth quashed the writ of attachment against the Judgments Fund. Mr. Flatow filed a motion for reconsideration.

On October 21, 1998, President Clinton signed an Omnibus Appropriation bill into law which amended the Foreign Sovereign Immunities Act to add blocked assets and other foreign property regulated by the United States as property belonging to a foreign government which could be attached in aid of execution of a judgment under §1605(a)(7). The bill contained a waiver that allowed the President to waive the provisions allowing new forms of foreign property to be attached. Pub.L. 105-277, Title I, §117 (d). The President exercised this waiver and on October 21, 1998, and issued Presidential Determination No. 99-1 which stated that implementation of the new provisions allowing execution of a judgment under 28 U.S.C. §1605(a)(7) by attaching foreign property regulated by the United States "would impede the ability of the President to conduct foreign policy in the interest of national security."

In the original proceeding before the District Court for the District of Columbia, Mr. Flatow has thus far been unsuccessful in collecting on the judgment. Mr. Flatow has attempted in several other jurisdictions to obtain writs of execution on assets belonging to entities in the United States that are purportedly controlled by

the Iranian Government.[1] Mr. Flatow registered the judgment in

---

[1] On February 1, 1999, Mr. Flatow filed a motion to intervene in a suit before Judge Brewster in this district. See Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Ira v. Cubic Defense Systems, INC., 29 F.Supp.2d 1168 (S.D.Cal. 1998), *appeal docketed*, No. 99-56380. In this case, Judge Brewster confirmed an arbitral award made by the International Chamber of Commerce ("ICC") in favor of Iran and against Cubic System, a defense supplier. Mr. Flatow had registered the judgment awarded him by the District Court for the District of Columbia with the United States District Court for the Eastern District of Virginia. On December 21, 1998, at Mr. Flatow's request, the District Court for the Eastern District of Virginia issued a summons in garnishment directed at Cubic Systems, a defense supplier. Mr. Flatow claimed that intervention in the suit in the Southern District of California regarding the arbitral award was necessary to protect his interests. Judge Brewster found that Mr. Flatow's motion was untimely and that Mr. Flatow failed to show that his interests related to the transaction was related to the subject matter of the litigation, as required by Federal Rule of Civil Procedure 24(a)(2). See April 6, 1999 Order Denying Motion of Stephen M. Flatow for Leave to Intervene, 98cv1165. Mr. Flatow has appealed the District Court's denial of his motion for Leave to Intervene.

In the United States District Court for the District of Maryland, Mr. Flatow obtained writs of execution on properties in Maryland belonging to the Alavi Foundation, which the plaintiff alleges is an Iranian propaganda front owned and controlled by Iran. The Foundation moved the Court to quash the writs of execution and to enjoin Mr. Flatow from issuing future writs against the Alavi Foundation's property. Judge Williams found that the Foundation was not an instrumentality of the Iranian government, as the government did not exercise day to day control over the Foundation, and granted the Foundation's motions. See Flatow v. Islamic Republic of Iran, 67 F.Supp.2d 535 (D.Md. 1999). Mr. Flatow has appealed the decision in the Maryland case. He has also filed suits attempting to attach property belonging to the Alavi Foundation in Virginia and Texas; these cases are pending the resolution of the appeal in the Maryland case.

this Court on April 23, 1999. On September 14, 1999, Mr. Flatow obtained a writ of execution for $247,513,220.00 o property in Carlsbad owned by California land Holding Corporation was about to sell the property, Mr. Flatow and BSI agreed that the writ of execution should be released from the property so that escrow could close. The proceeds of the sale are being held in an interest-bearing account subject to the lien created by the writ of execution. The parties agreed to the terms of a consent order to this effect, which was entered by this Court on October 1, 1999.

On November 1, 1999, BSI filed a motion for release of the money held pursuant to the consent order. On November 24, 1999, Mr. Flatow filed an opposition to BSI's motion for release of money held. On November 26, 1999, Mr. Flatow filed a motion for condemnation of judgment-debtor assets. At oral argument held on Monday, February 28, 2000, the Court ordered the government to file briefing regarding Presidential Determination No. 99-1 and whether it applies to the assets at issue in this case. The government filed a statement of interest on April 3, 2000. The parties have filed responses. On April 13, 2000, Mr. Flatow filed a motion for an order to show cause directed to the Islamic Republic of Iran, the judgment-debtor, in accordance with the writ of execution attaching Iran's ownership interest in BSI. The Court has considered all the papers submitted.

DISSCUSSION

I. Legal Standard

A. Statutory Grounds for Execution of Assets Belonging to a Foreign State

The provisions of the Foreign Sovereign Immunity Act are the sole basis for jurisdiction of a United States court over assets of a foreign state or entity. In 1996, the AEDPA amended the Foreign Sovereign Immunities Act to allow standing for an individual to bring a lawsuit:

...in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency...

28 U.S.C. §1605(a)(7).[2]

The statute also required that the individual bringing the suit or the victim is a United States national, and that the foreign state to be sued is designated as a state sponsor of terrorism. Mr. Flatow met the statutory requirements and therefore successfully brought suit against Iran, obtaining a default judgment of $247,513,220.00. See Flatow v. Islamic Republic of Iran, 999 F.Supp. 1 (D.D.C. 1998).

In 1996, the Foreign Sovereign Immunities Act was

also amended to include a corresponding provision regarding exceptions to the immunity of foreign states from attachment or execution. Thus, in cases in which individuals entitled to sue foreign states under 28 U.S.C. §1605(a)(7) pursued such suits, property of the foreign state "used for commercial activity" in the United States was not immune from execution upon the judgment:

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or form execution, upon a judgment entered by a court of the United States or of a State...if

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

28 U.S.C. §1605(a)(7).

---

[2] The Clinton Administration objected to this amended FSIA provision that provided standing for individuals to sue foreign states. See *Flatow Memorandum of Points and d Authorities in Support of Opposition*, Exh. A at 7.

On October 21, 1998, as a part of the Omnibus Appropriation bill, Congress passed additional provisions regarding the collection of a judgment awarded under 28 U.S.C. §(a)(7) for terrorist activity. See Pub.L. 105-277, Title I, §117. These provisions added categories of property (in addition to property used for commercial activity) belonging to a foreign state that could be attached in aid of execution of a judgment under 28 U.S.C. §1605(a)(7):

(f)(1)(A) Notwithstanding any other provision of law...any property with respect to which financial transactions are prohibited or regulated pursuant to 5(b) of the Trading with the Enemy Act, section 620(a) of the Foreign Assistance Act of 1961, sections 202 and 203 of the International Emergency Economic Powers Act, or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality of such state) claiming such property is not immune under section 1605(a)(7).

28 U.S.C. §1610(f)(1)(A), 28 U.S.C. §1610(f)(2)(A).[3]

On October 21, 1998, the same date the Omnibus Appropriation bill was passed, the President exercised the waiver and issued Presidential Determination No. 99-1, which states:

By authority vested in me as President by the Constitution and laws of the United States of America, including section 117 of the Treasury and General Government Appropriation Act, 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriation Act, 1999 (approved October 21, 1998), I hereby determine that the requirements of section 117, including the requirement that any property with respect to which financial transactions are prohibited or regulated [under the

---

[3] The Clinton Administration strongly apposed the enactment of these provisions under §117 of the Omnibus Appropriation bill. Secretary of State Madeleine Albright informed the Senate Appropriation Committee that president Clinton would veto the bill if §117 did not include a waiver. See *Flatow Memorandum of Points and Authorities in Support of Opposition*, Exh. C at 5. Accordingly, §117(d) states "The President may waive the requirements of this section in the interest of national security."

Trading with the Enemy Act, the Foreign Assistance Act, or the International Emergency Economic Powers Act] be subject to execution or attachment is aid of execution of any judgment relating to a claim for which a foreign state claiming such property is not immune from the jurisdiction of courts of the United States or of the States under 28 U.S.C. §1605(a)(7), would impede the ability of the President to conduct foreign policy on the interest of national security and would, in particular, impede the effectiveness of such prohibitions and regulations upon financial transactions, and therefore, pursuant to section 117(d), I hereby waive the requirements of section 117 in the interest of national security.

The Secretary of State is authorized and directed to publish this determination in the Federal Register.

In Presidential Determination No. 99-1, the President effectively "deactivated" the provisions of Section 117 that added new categories o foreign property, such as diplomatic property and blocked assets, to the foreign assets that could be attached before the Omnibus Appropriation bill was passed. The effect of the waiver, therefore, was to bring the state of the law regarding attachment of property of foreign states for judgment under 28 U.S.C. §1605(a)(7) back to the *status quo ante* the 1999 bill. See *United Sates' Statement of Interest* at 6. Pursuant to the Presidential Determination, the categories of property addressed in section 117 may not be attached in aid of judgment against terrorist nations.

The assets at issue in this case are the proceeds of a sale of property in Carlsbad by California Land Holding Corporation, a wholly-owned subsidiary of Bank Saderat Iran. Bank Saderat Iran is an Iranian Corporation, organized under the banking laws of Iran as a banking corporation. It was founded in 1952 and consists of more than 3,000 branch offices in Iran, as well as branches throughout Middle East, London, Paris, Hamburg and New York. See *BSI Motion for Release of Money, Eliassi Declaration*, ¶3. The New York representative office is the only office BSI has in the United States. See *BSI Reply in Support of Motion for Release of Money, Kerekes Declaration*, ¶2. BSI conducts the operations of its New York office pursuant to a license issued under the International Emergency Economic Powers Act, 50 U.S.C. §1701-

1702. See *BSI Reply in Support of Motion for Release of Money*, Exh. I. Counsel for BSI stated at oral argument that BSI owned the property in Carlsbad because of foreclosure, and that BSI was not speculating on the land.

BSI asserts that the property at issue is regulated under the International Emergency Economic Powers Act, section 203, and therefore falls under the types of property referred to in section 117 of the 1999 bill, and which the President later stated could not be attached in execution of a §1605(a)(7) judgment. BSI obtained a specific license under Section 203 of the International Emergency Economic Powers Act in order to complete the sale of the Carlsbad property. See *BSI Reply in Support of Motion for Release of Money*, Exh. J, K. Accordingly, the proceeds of the sale come under the provisions of the Presidential Determination, which refers to "any property with respect to which financial transactions are prohibited or regulated...pursuant to section 202 and 203 of the International Emergency Economic Powers Act." *Presidential Determination No.* 99-1. Mr. Flatow contends that, despite Presidential Determination No 99-1, execution of BSI's sale proceeds to satisfy this judgment against Iran is permitted under statute.

B. Standard for Determining Whether BSI is "an Agency or Instrumentality" of Iran

Mr. Flatow argues that BSI, although not the equivalent of the Islamic Republic of Iran, is "an agency or instrumentality" of Iran. 28 U.S.C. §1610(b). The FSIA permits execution of the property belonging to "an agency or instrumentality" of a foreign state where the claim is awarded against such foreign state:

(b) In addition to subsection (a), any property in the United States of any agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State...if...

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or (7) or 1605(b) of this chapter, regardless of whether the

property is or was involved in the act upon which the claim is based.

28 U.S.C. §1610(b)(2).

In this case, Mr. Flatow's claim is against the Islamic Republic of Iran, not BSI. Therefore, Mr. Flatow may not attach assets belonging to BSI in aid of execution on a judgment against Iran unless he proves that BSI is "an agency or instrumentality" of Iran.

BSI argues that, under 28 U.S.C. §1610(b)(2), BSI does not constitute "an agency or instrumentality" of Iran. The Supreme Court has stated that "[f]reely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign." First National City bank v. Banco Para El Comercio Exterior de Cuba (Bancec), 462 U.S. 611, 626 (1983). The Court held in Bancec that Banco Para el Comercio Exterior de Cuba ("Bancec") was required to pay a set-off of funds owned to First National Bank by Cuba.

The facts in Bancec are as follows: In 1960, Bancec was established by the Republic of Cuba "as an autonomous credit institution for foreign trade." Id. At 613. In the same year, Bancec sought to collect on a letter of credit issued by petitioner First National City Bank United States. Id. Shortly after Citibank received the request for collection, all of its assets in Cuba were seized and nationalized by the Cuban government. When Bancec brought suit on the letter of credit in the United States District Court, Citibank counterclaimed, asserting a right to set off the value of its seized Cuban assets. Id. Bancec had been dissolved and its capital had been split between a Cuban national bank and the foreign trade enterprises of the Ministry of Foreign Trade. The Court determined that Bancec did not have separate juridical status and that, because Bancec was asserting a claim in a United Sates court, it could not asset the defense of sovereign immunity to defeat a setoff or counterclaim." Id. At 630. Accordingly, the Court allowed Citibank to claim a setoff against Bancec for its assets seized by Cuba.

In oral argument, counsel for Mr. Flatow cited Bancec for the proposition that a bank established by a foreign county should

be considered the alter ego of the foreign country. The Court finds that the facts of this case are different from those in Bancec. Mr. Flatow has not shown that BSI operates as an arm of the Iranian government, or that BSI's mission is to further the policies of the Iranian Government. Further, unlike the situation in Bancec, BSI is not attempting to use a United States court to recover on a claim while at the same time trying to avoid being the subject of an adversary proceeding. Here, BSI is a non-party to the underlying case.

Bancec established that, unless the entity is found to be an alter ego of the foreign government, the Foreign Sovereign Immunity Act does not permit execution upon its assets. The Supreme Court cited the legislative history of the FSIA: "During its deliberations, Congress clearly expressed its intention that duly created instrumentalities of a foreign state are to be accorded a presumption of independence status." Id. At 627. The Court held in Bancec that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." Id. At 626-27. In order to overcome this presumption of independence, plaintiff must show that the entity at issue is "so extensively controlled by" the foreign state "that a relationship of principal and agent is created," to that regarding the entity as separate from the foreign government "would work fraud or injustice." Id. At 629.

In Chuidian v. Philippine National Bank, 912 F.2d 1095, 1104 (9th Cir. 1990), the Ninth Circuit applied the Bancec standard. In this case, a Philippine official directed the California branch of Philippine national. Id. At 1097. The district court had dismissed the action against the Philippine government commission and its official. Id. at 1096. On appeal, Chuidian argued that the Philippine national Bank and the Philippine Export and Foreign Loan Guarantee Corporation, as Philippine governmental entities, had waived their immunity and that this should be sufficient to waive the immunity of the Philippine government commission and its official. Id. At 1099. The Ninth Circuit affirmed the dismissal and stated by the Guarantee Corporation or the Bank should not operate against Daza [the government official]. The Republic of the Philippines has established these instrumentalities as separate

juridical entities, and absent allegations of fraudulent purposes, see Bancec, 462 U.S. at 629, we must treat them as such." Id. at 1104.

For the purposes of the Foreign Sovereign Immunities Act, a principal-agent relationship is established when the foreign exercises day-to-day control over the entity's activities. See Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170, 178-81 (5th Cir. 1989) (holding that an entity in which Nigeria held 100% of its stock was not an agent because there was no showing of day-to-day control); Flatow v. Islamic Republic of Iran, 67 F.Supp.2d 535, 539 (D.Md. 1999) (the standard, derived from Bancec, for whether a foreign entity is an instrumentality of the foreign state is "the day-to-day control rule").

II. Analysis

A. Plaintiff's Motion for Condemnation of Assets of Judgment-Debtor

1. Relevance of Presidential Determination NO. 99-1

BSI asserts that the license it obtained from the Office of Foreign Assets Control ("OFAC") to complete the sale of the property in Carlsbad was granted under section 203 of the International Emergency Economic Power Act. As Presidential Determination No. 99-1 states that property regulated under this statute may not be attached, the proceeds of the sale similarly may not be attached in aid of execution of Mr. Flatow's judgment. The license issued to BSI states:

Granted under the authority of Section 505 of the International Security and Development Cooperation Act of 1985 (22 U.S.C. §2349aa-9), *Section 203 of the International Emergency Economic Powers Act* (50 U.S.C. §1702), the National Emergencies Act (50 U.S.C. §1601 et. seq.), Executive Orders 12613, 12957, and 12959 and 31 C.F.R. Part 560.

BSI Reply in Support of Motion for Release of Money, Exh. J, K (emphasis added).

In its statement of interest filed in this case, the government assets that the proceeds of the sale of property in Carlsbad is not one of the types of regulated property that Presidential Determination No. 99-1 protects from attachment. "The property at

issue in this proceeding is not subject to a prohibition on attachment under the FSIA, the Foreign Mission Act, or the Iranian Assets Control Regulations...Although certain transactions [the sale of the property pursuant to the license issued by the OFAC]

May be regulated under the more recent Iranian Transactions Regulations, 31 C.F.R.Pt. 560, there is no prohibition on attachment of assets under these regulations." *United States' Statement of Interest* at 7.

The Iranian Assets Control Regulations regulated assets of the Government of Iran escrow accounts to satisfy awards made by a joint Iran-United States claims tribunal. Mr. Flatow refers to these assets as "blocked assets." The claims tribunal resolved claims that arose out of the expropriation and nationalization of the assets of American entities that were doing business in Iran when the Ayatolla Khomeini came to power in 1979. Mr. Flatow has submitted a declaration from Lorraine Lawlor, a Senior Compliance Officer in the United States Department of the Treasury in the Office of Foreign Assets Control ("OFAC"), stating that she is not aware of any assets of BSI in the United States, including the California Land Holding Corporation, that have been treated as blocked assets. See *Lawlor Declaration* at 2. Mr. Flatow therefore concludes that presidential Determination No. 99-1 does not apply to the assets at issue in this case.

The government appears to agree that the property at issue does not fall under the types of property described in presidential Determination No. 99-1 as immune from attachment. However, the government's statement does not address the fact that the license pursuant to which the property was sold and the proceeds obtained says it is "granted under the authority of...Section 203 of the International Emergency Economic Powers Act," which is one of the regulations specifically listed in the Presidential Determination as rendering property immune from attachment. *BSI Reply in Support of Motion for Release of Money*, Exh. J, K.[4] Presidential Determination No. 99-1 refers to "any property with respect to which financial transactions are prohibited or regulated pursuant

---

[4] It appears that Lorraine Lawlor faxed the license to Mr. Ibrahim Bahmaie at Bank Saderat Iran in New York on January 13, 1997.

to...sections 202 and 203 of the International Emergency Economic Powers Act" and states that the President waives the provision of the bill that allows attachment of these assets. Accordingly, the government's statement appears inconsistent with the text of the license.

The Court finds that clarification of the government's position with regard to whether Presidential Determination No. 99-1 applies to the Property at issue in this case is unnecessary, because the threshold issue is whether property belonging to BSI may be attached in aid of execution of a judgment against the Islamic Republic of Iran.

The government's statement of interest concludes:

Plaintiff has identified a waiver of immunity under the FSIA that makes commercial property of an agency or instrumentality of a foreign state amenable to attachment in aid of execution of a judgment obtained under §1605(a)(7). See 28 U.S.C. §1610(b)(2). Bank Saderat Iran has not identified any independent limitation on attachment of its asset in either the FSIA, Presidential Determination 99-1, or any other statute or regulation. Accordingly, it is the view of the United States that the property belonging to Bank Saderat Iran is amenable to attachment if *Bank Saderat Iran can be held liable for the judgment imposed in plaintiff's underlying suit.*

United State' Statement of Interest at 7-8 (emphasis added). In order to determine whether BSI "can be held liable for the judgment imposed" against the Islamic Republic of Iran, the Court must decide whether BSI is separate juridical entity, or should be considered "an agency or instrumentality" of Iran.

2. The Separate Juridical Status of Bank Saderat Iran

a. The Bancec Standard Applies in This Case

Mr. Flatow assets that the Bancec presumption o f separate juridical status and the requirement of day-to-day control should not apply in this case. He claims that the Bancec standard was developed for application under a different provision of the Foreign Sovereign Immunities Act, the commercial activities exception to foreign sovereign immunity (28 U.S.C. §1605(a)(2)), which had a

different history and purpose than 28 U.S.C. §1605(a)(7). Mr. Flatow contends that the purpose of §1605(a)(7) is to impose financial penalties on foreign states engaging in terrorist activity, and therefore the presumption of separate status of foreign entities should be more easily overcome in cases where jurisdiction is based on this provision.

Mr. Flatow made the same argument in the case he brought in Maryland, where he registered the judgment and attempted to execute on property belonging to the Alavi Foundation. The Court quashed the writs of execution on the Foundation's property. In response to Mr. Flatow's argument that the Bancec presumption should be more easily overcome in a case involving §1605(a)(7), the Court stated: "The Court is not persuaded that Plaintiff's more lenient standard, which would find that an entity is an instrumentality if there is proof that the foreign sovereign has any interest in that entity, is applicable...There is nothing in the language of the provision itself of the legislative history that indicates that Congress intended 28 U.S.C. §1605(a)(7) to be interpreted differently that the other provisions of the statute...Therefore, the Court finds that the day-to-day control rule is applicable to §1605(a)(7) as well." Flatow v. Islamic Republic of Iran, 67 F.Supp.2d 535, 539 (D.D. 1999).

Similar arguments were made in Alejandre v. Telefonica Larga Distancia de Puerto Rico, 183 F.3d 1277 (11th Cir. 1999), *reh'g denied*, 205 F.3d 1357 (11th Cir. 1999). In Alejandre, families of American victims of Cuban terrorism, who had obtained a judgment against the Cuban government, moved to enforce writs obtained against ETECSA, a company incorporated under Cuban law, with stock held by Telefonica Larga Distancia de Puerto Rico. The District Court found that payments made to ETECSA could be garnished in satisfaction of the judgment against Cuba. The Eleventh Circuit reversed and found that the District Court had erred in finding that the Bancec presumption of separate juridical status for corporate entities was overcome in this case. Alejandre, 183 F.3d at 1286. The District Court had relied on the Bancec exception in cases where recognizing the separate status of an entity would work fraud or injustice. Id. The Circuit Court found that plaintiff had made no showing that asst transfers made by

ETECSA were intended to insulate payments from garnishment by creditors of the Cuban Government. Id. The District Court cited the injustice of preventing families from obtaining satisfaction of judgments entered against Cuba for terrorist acts; however, the Eleventh Circuit found that this public policy concern was not sufficient to alter the well-established standard for recognition of foreign corporate entities:

Upon reviewing this rationale *de novo*, we conclude that it is not sufficient basis for overcoming the presumption of separate juridical status that ETECSA enjoys. While the district court's concern about the injustice of preventing plaintiffs from collecting their judgment is understandable, this concern is present in every case in which a plaintiff seeks to hold an instrumentality responsible for the debts of its related government. Allowing the Bancec presumption of separate juridical status to be so easily overcome would effectively render it a nullity. We recognize that the district court made an effort to distinguish this case based upon the gravity of the underlying violation of international law. Given the absence of any evidence that ETCSA was involved in the violation, however, we fail to see how this distinction is relevant to the question of whether ETECSA's separate juridical status should be overcome. Alejandre, 183 F.3d at 1286-87.

The Court rejects Mr. Flatow's argument that the Bancec presumption of separate juridical status does not apply to this case. Accordingly, the Court will use the standard set out by the Supreme Court in Bancec to determine whether BSI is separate juridical entity from the Islamic Republic of Iran.

b. Application of the Bancec Standard

Under Bancec, there are two possible means for overcoming the presumption of independent juridical status of foreign entities: (1) "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created," or (2) where to recognize the corporate entity "would work fraud or injustice." Bancec, 462 U.S. at 629. The Eleventh Circuit in Alejandre found claimants could not attach property of a foreign entity under §1605(a)(7) if the entity's separable juridical status was valid and not established for the purpose of avoiding liability for the foreign government's debts. Alejandre, 183 F.3d at 1286-

87. In this case, Mr. Flatow assets fraud or injustice would result if property belonging to BSI were not attached in aid of execution on the judgment against Iran. However, Alejandre rejected this argument: "While the district court's concern about the injustice of preventing plaintiffs from collecting their judgment is understandable, this concern is present in every case in which a plaintiff seeks to hold an instrumentality responsible for the debts of its related government. Allowing the Bancec presumption to be so easily overcome would effectively render it a nullity." Id. As there is no assertion that BSI participated in the terrorist acts that are the subject of the underlying suit, or that BSI is a sham entity established to allow Iran to avoid liability, the Court finds that recognition of BSI as a separate juridical entity would not "work fraud or injustice." Bancec, 462 U.S. at 629. As the Bancec presumption cannot be overcome in this case due to the possibility of "fraud or injustice," the Court will turn to the "extensive control" test.

In order to determine whether "a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created," the Court must determine whether there exists "day-to-day control." See Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170, 178-81 (5th Cir, 1989). Mr. Flatow has the burden of proving that BSI is "not entitled to separate recognition. A creditor seeking execution against an apparently separate entity must prove the property to be attached is subject to execution." Letelier v. Republic of Chile, 748 F.2d 790, 795 (5th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985).

BSI has provided the Court with a translation of its Articles of Incorporation ("Articles") Alireza Eliassi, the manager of the New York representative office of BSI (*Motion for Release of money, Elliassi Declaration*) and from Mohammedreza Moghadasi, the managing director Iranian banking laws as a banking corporation. It was founded in 1952 in Tehran, Iran and until 1979, BSI was a privately owned bank. On June 7, 1979, the Iranian government nationalized all Iranian banks. However, BSI continued to operate as a separate banking entity. BSI consists of more that 3,000 branch offices in Iran, as well as branches throughout the Middle East, London, Paris, Hamburg, and New York. See *BSI Motion for*

Release of Money, Eliassi Declaration, ¶3. The New York representative office is the only office BSI has in the United States. See *Reply in Support of Release of Money, Kerekes Declaration*, ¶2. Iran owns all the stock (capital) in BSI. BSI's operations are governed by its Articles of Association, established in 1982. See *Eliassi Declaration*, ¶¶3-5; *Moghadasi Declaration* ¶¶5, 6. The stated objective of the Bank is "to execute banking operation and services within the country and abroad." *Articles of Incorporation* ¶2. "Bank Saderat Iran is not subject to general rules and regulations related to the ministries and government-affiliated companies and organizations," *Articles* ¶1.

BSI activities are regulated by the Board of directors, which consists of the managing Director, one person from among the Bank staff, and five other recommended individuals. *Articles* ¶19. The members of the Board of directors are elected for three years and may be re-elected. Id. The Managing Director holds the highest administrative and executive position and has authority to determine bank policies. *Articles* ¶20. The Board of Directors is responsible for and presides over the daily activities of the Bank. *Articles* ¶21. Two government entities regulate BSI: The General Assembly of banks consists of the Minister of Economic and Financial Affairs, the Minister of Industries and Mines, the Minister of Commerce, the Minister of Agriculture and Rural Development, the Minister of Housing and Town Planning, and the Director of Plan and Budget Organization. *Articles* ¶8. The General Assembly meets on a yearly basis to review the status of banks in Iran. The general Assembly reviews BSI's Articles of Incorporation. *Articles* ¶11; *Moghadasi Declaration* ¶12.

The High Council of banks consists of the Director General of Central Bank of Iran, the General Manager of Bank Melli Iran, a representative of the Ministry of Economic and Financial Affairs, a representative of the Ministry of Housing and Town Planning, a representative of the Ministry of Agriculture and Rural Development, a representative of the Ministry of Commerce, and a representative of the Ministry of Industries. *Articles* ¶15. The High Council of Banks has an advisory role to the General Assembly of Banks and meets on a weekly basis. *Moghadasi Declaration* ¶14. The High Council proposes the names of possible members of

BSI's board of directors and assists in the preparation of bank regulations, budgets, and reports on banking operations in Iran. *Articles* ¶15; *Moghadasi Declaration* ¶14. The High Council does not get involved in the day to day operations of BSI. Id. BSI asserts that the General Assembly of Banks and the High Council of Banks perform broad policy-making functions to ensure the smooth operation of Iranian banks, much like the United States Federal Reserve.

The Managing Director of BSI, Mohammedreza Moghadasi, asserts in his declaration that the members of the board of directors of BSI are all career bankers with extensive experience in finance and banking from working in other banks or as advisors. *Moghadasi Declaration* ¶7. The board of directors appoints the officers of the bank and oversee the bank's affairs. Id. The bank's daily activities include accepting deposits, loan and investment activities, letters of credit, credit collections, and payment order transactions. Id. ¶6. The bank's board of directors and officers, not the government of Iran, control these operations. Id. ¶7.

Mr. Flatow alleges that, because Iran owns the capital of BSI and because the General Assembly of Banks and the High Council of Banks recommend members of the Board of Directors and review bank policy, BSI is "extremely controlled" by the Iranian government. BSI points out cases in which banks wholly-owned by a foreign country were found to have separate juridical status and therefore their assets could not be attached to satisfy debts of the foreign country. First, in Banco Nacional de Cuba v. Chemical Bank, 782 F.2d 377 (2nd Cir. 1986). Chemical Bank argued that, in response to Banco Nacional's attempt to collect from Chemical, Chemical should be allowed a set-off for its assets that had been expropriated by Cuba. The Second Circuit found that, although Banco National was owned by Cuba, it was separate entity from Cuba and had no involvement in Chemical Bank's losses. Id. at 380. The court stared that allowing a se-off would establish "a general rule that no instrumentality of any foreign government could collect a debt owned it by an American bank without setoff of any debt owed to that bank by any entity that had been expropriated by that foreign government." Id.

Second, in Pravin Banker Associates v. Banco Popular del Peru, 9 F.Supp.2d 300 (S.D.N.Y. 1998), Pravin (a judgment creditor) sought to attach assets of an entity fully owned by Peru, to satisfy a judgment Pravin obtained against Peru. The court found that, despite the fat that Peru had participated in and monitored the privatization of the entity, "such oversight is similar to the conduct of a majority shareholder, is not unusual, and can not be the basis for ignoring the corporate form." Id. at 306. Furthermore, the entity was not established in an attempt to shield assets of Peru. Id. As Pravin failed to demonstrate that the entity was "dominated and controlled" by Peru, the Court declined to allow attachment of the entity's assets in satisfaction of a judgment against Peru. Id. In another case in which a creditor sought to attach assets on Minpeco, a company owned by Peru, to satisfy a debt against Peru, the district court found that even though "Peru participated in Minpeco's major policy decisions, these factors have only limited legal significance. Clearly, any sole shareholder has a strong legitimate interest in the major decisions of a wholly-owned corporation. For the purposes of establishing an alter ego relationship the more significant question is whether the government exercised day-to-day control over the instrumentality's operations." Minepeco, S.A. v. Hunt, 686 F.Supp. 427, 435 (S.D.N.Y. 1988).

The Court finds that the limited supervision by the General Assembly of Banks and the High Council does not constitute day-to-day control and does not prove that BSI is controlled by Iran. The Articles of Incorporation and the declarations of bank officers show that the Board of Directors regulates the daily affairs of the bank. Government involvement must rise to the level of, for example, requiring governmental agency approval of invoices, stamping invoices with the government seal, and requiring that all checks be signed by a government agent before the presumption of separate juridical status may be overcome. See Kalamazoo Spice Extraction Co. v. Provision Military Government of Socialist Ethiopia, 616 F.Supp. 660, 666 (W.D.Mich. 1985). The level of control must be such that the foreign government and the foreign company are "shown to be the same entity." In Alejandre v. Telefonica Larga Distancia de Puerto Rico, 183 F.3d 1277 (11th Cir. 1999), the court stated that "applying this presumption of

separate juridical status at the immunity stage is consistent with the logic of section 1610(a)(7). Unless ETECSA and the Cuban Government are shown to be the same entity, it would make little sense to read section 1610(a)(7) as providing that the U.S. commercial property of ETECSA is not immune from garnishment to satisfy a judgment relating to a claim from which the *Cuban Government* was not immune under section 1605(a)(7). Id. at 1284 n.17.

In McKesson Corp. v. Islamic Republic of Iran, 52 F.3d 246, (D.C.Cir. 1995), *cert. denied*, 516 U.S. 1045 (1996), the Court found that Pak Dairy, a dairy located in Iran whose "main objective is...to protect the interest of the country" was not a separate juridical entity from Iran because "routine business, such as declaring and paying dividends to shareholders and honoring the dairy's contractual commitments, were dictated by Iran through the Financial Organization and other governmental representatives on Pak Dairy's board." McKesson Corp., 52 F.3d at 351-52. Furthermore, Pak Dairy carried out non-commercial government policies, such as "rampant anti-American propaganda, expulsions of Americans and taking of American interests." Id. at 352. For example, "board decided that Pak dairy would not pay any money to foreign shareholders." Id.

Pak Dairy's structure and objectives were totally different from those of BSI. First, BSI's board of directors does not consist of any government representatives: in fact, BSI's Articles of Incorporation state that "members of the Board of Directors can not participate in any commercial activity or hold any other government job during the tenure of the job's period." *Articles* ¶24. It is the BSI board of directors who make routine business decisions, not Iranian government entities. See *Articles* ¶20, 21. The General Assembly of Banks and the High Council of Banks have only limited supervisory roles. Second, the stated objective of BSI is simply "to execute banking operations and services within the country and abroad. The Bank is simply "to execute banking operations and services within the country and abroad. The Bank should provide due facilities in domestic and foreign commercial affairs." *Articles* ¶2. The court stated in McKesson: 'Here the government policy was not commercial. It was instead designed to injure some of the

corporation's own shareholders and to do so through a corporate policy guided by government representatives." 52 F.3d at 352. Lastly, whereas Pak Dairy was directly involved in the harm caused to the claimant, BSI had no involvement in the terrorist attack for which Mr. Flatow was awarded a judgment against the Islamic Republic of Iran. Accordingly, this case can be distinguished from McKesson.

The Court finds that Iran's ownership of BSI's capital does not lead to a determination that BSI is controlled by Iran. In Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170, 181 (5th Cir. 1989), the Fifth Circuit held that a company which was owned by Nigeria and whose board of directors was appointed by the Nigerian government still had separate juridical status, even though the Ministry of Agriculture had a general supervisory role. The court stated: "The sort of extensive control which was demonstrated in Kalamazoo and Bancec simply did not exist here. The two factors of 100% ownership and appointment of the board of directors cannot by themselves force a court to disregard the separateness of juridical entities." Id.

After a careful review of the arguments presented by the parties, the declaration and other supporting documents, and the relevant case law, the Court find that the Islamic Republic of Iran does not exercise the day-to-day control over Bank Saderat Iran that would justify considering BSI an "agency or instrumentality" of the Iranian Government. Accordingly, the Court finds that, under the Foreign Sovereign Immunities Act, it does not have jurisdiction to execute property belonging to BSI in satisfaction of the judgment awarded to Mr. Flatow against Iran. See 28 U.S.C. §1610(b)(2).

B. Plaintiff's Motion for Order to Show Cause as to Judgment Debtor

At oral argument, Mr. Flatow argued that, if the Court finds BSI is a separate juridical entity from the Islamic Republic of Iran, then the Court should issue a show cause order to Iran, asking Iran to show cause why Mr. Flatow may not attach its ownership interest in BSI. However, once the Court determines BSI has separate juridical status from Iran and cannot be held liable for a judgment against Iran, there is not reason to issue a writ of

execution on Iran's ownership interest in the Bank and show cause order to Iran. The relevant case law indicates that, once the Court makes a determination that the entity has separate juridical status from the foreign state, no attachment is permitted. See Flatow v. Islamic Republic of Iran, 67 F.Supp.2d 535, 543 (D.Md. 1999) ("as Plaintiff cannot establish that the Foundation was an agent, alter ego, or instrumentality of the Iranian Government,...Plaintiff was not entitled to a levy on these properties. Therefore, the Court will release the properties from the levy, and squash the writs of execution against them."). In Hester Int'l Corp. v. Federal Republic of Nigeria, once the district court determined that the state-owned company at issue, national Grains Production Company ("NGPC") had separate juridical status from Nigeria, the Court did not proceed to issue a show cause order to Nigeria, asking Nigeria to show cause why the claimant may not attach Nigeria's ownership interest in NGPC to satisfy its judgment against Nigeria. See Hester Int'l Corp., 681 F.Supp. 371, 381 (N.D.Miss. 1988), *aff'd* Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170 (5th cir. 1989). Such a result would not make sense. Instead, after determining that the company was not an alter ego of Nigeria, the Fifth Circuit dismissed the claimant's action for recovery of NGPC's assets. See Hester, 681 F.Supp. at 387.

Mr. Flatow has not provided legal support for why, if the Court finds that BSI has a separate juridical status from the Islamic Republic of Iran and its assets may not be attached in aid execution on a judgment against Iran, the Court should issue a show cause order to Iran regarding attachment of its ownership interest in BSI. Accordingly, the Court denies Mr. Flatow's motion for an order to show cause directed to Iran.

C. BSI's Motion For Release of Funds Held Pursuant to Consent Order

For the reasons stated above, the Court finds that the presumption of separate status is not overcome in this case and therefore BSI's assets may not be attached in order to satisfy a judgment entered against Iran. Accordingly, the Court denies Mr. Flatow's motion for condemnation of the assets of the judgment-debtor. The assets held in escrow in Comerica Bank, Account #1891204974, total $247,513,220.00 are the proceeds of the sale of

property in Carlsbad by BSI's subsidiary. BSI has filed a motion for release of those funds back to BSI.

Although the Court has made a determination that Iran does not exert sufficient day-to-day control over BSI, rather that release the funds at this time, the Court will permit the parties attempt to conduct discovery on this issue, as requested by Mr. Flatow. Accordingly, the Court denies without prejudice BSI's motion for release of the funds. The parties may pursue discovery until **July 31, 2000** on the issue of whether the Islamic Republic of Iran asserts sufficient day-to-day control over BSI in order to be considered an agency or instrumentality of Iran.

CONCLUSION

After careful consideration of the papers submitted by the parties, the oral argument heard by the Court, the facts of this case, and the applicable law, the Court orders the following:

(1) Plaintiff's motion for condemnation of assets of judgment-debtor is DENIED;

(2) BSI's Motion for sanctions is WITHDRAWN;

(3) Plaintiff's motion for order to show cause as to judgment debtor the Islamic Republic of Iran is DENIED;

(4) BSI's motion for release of funds held pursuant to consent is DENIED WITHOUT PREJUDICE; and

(5) Plaintiff's request to conduct discovery on the issue of whether Iran asserts day-to-day control over BSI is GRANTED.

The parties may conduct discovery n the issue of control until **July 31, 2000**. The Court sets a hearing date for BSI's renewed motion for release of funds on **August 7, 2000, at 10:30 a.m.**

IT IS SO ORDERED.

Dated: May 19, 2000

By {Signature}

MARILYN L. HUFF, CHIEF JUDGE

UNITED STATES DISTRICT COURT

cc: Steven William Kerekes
Thomas Fortune Fay
Jane Carol Norman

APPENDIX D

United States District Court for the Southern District of California

99 – MC – 250

REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE PURSUANT TO THE HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The United States District Court of the Southern District of California presents its compliments to the Ministry of Justice, Civil Division of International Judicial Assistance of the Republic of France, 13 Place Vendome, Paris, France, and requests international assistance to obtain evidence to be used in a civil proceeding before this Court in the above matter.

This Court requests the assistance described below as necessary in the interests of justice and further requests that the testimony be received by Victor Holm, who has been designated as a Commissioner by this Court and by the United States District Court for the District of Columbia for the purpose of administering oaths and taking testimony abroad in the above captioned matter. Copies of the Orders appointing Victor Holm for this purpose are attached.

The above action is a civil claim that was filed on behalf of the Estate of Alisa Flatow under the Foreign Sovereign Immunities Act, 28 U.S.C. Section 1605(a)(7) against the Islamic Republic of Iran, an agency of that government and officials of that government. This action came on for trial before the United States District Court for the District of Columbia in February, 1998, resulting in a judgment in the amount of $247,513,220.00 against the Defendants, jointly and severally. The proceedings now before the Court are pursuant to Federal Civil Rule 69(a) in aid of execution upon that judgment. The assistance requested of the Republic of France consists of permission from the Government of the Republic of France to take the deposition testimony of Abolhassan Bahi Sadr, a person living in the Republic of France under the protection of the Republic of France, who is willing, without use of compulsory court process, to answer inquiries by Counsel for the Plaintiffs.

The Plaintiff, upon whose application this Request has been issued, shall pay all costs incurred in executing these requests. In addition, the Plaintiff is prepared to reimburse the appropriate authorities in the Republic of France for any costs incurred in executing this Request.

The testimony shall be taken in accordance with the general conditions set forth in the adherence of the republic of France to the treaty filed on March 27, 1993, a copy of which is attached to this Request, unless otherwise determined by the Ministry of Justice, Civil Division of International Judicial Assistance, Republic of France. The motive for this request, in accordance with the requirements set forth in the adherence of the Republic of France to The Hague Convention, is to obtain testimony which is admissible upon hearing in this action, with the opportunity for all

adverse parties to cross examine the witness. The appointment of a commissioner to take deposition testimony in a foreign country for use in a United States court is governed by United States District Judge to whom application is made. There are no specific criteria set forth by Federal Civil Rule 28(b), American statutes or case law governing appointment of a commissioner to take testimony abroad by a United States Court. This testimony will be taken at the American Consulate, #2, Rue Saint-Florentin, 75382 PARIS Cedex 08, France. The proposed date of deposition is Monday, July 17, 2000.

This Court expresses its appreciation to the competent authority in the Republic of France for its courtesy and assistance in this matter and states that it shall be ready and willing to assist the court of the Republic of France in a similar manner when requested.

Date:_____ _____

MARILIN L. HUFF

CHIEF JUDGE
UNITED STATES
DISTRICT COURT

APPENDIX E

United States District Court for the Southern District of California

99-MC-250

Stephen M. Flatow,

Plaintiff,

v.

The Islamic Republic of Iran, et al,

Defendant

ORDER DENYING PLAINTIFF'S REQUEST FOR INTERNATIONAL ASSISTANCE PURSUANT TO THE HAGUE CONVENTION ON THE TAKING OF EVIDENCE ABROAD AND GRANTING BSI's MOTION FOR A PROTECTIVE ORDER

On May 22, 2000, the Court issued an order granting plaintiff's request to conduct discovery on the issue of whether the Islamic Republic of Iran exerts sufficient day-to-day control over bank Saderat Iran ("BSI") so that BSI can be considered an agency or instrumentality of Iran. See *May 22, 2000 Order Denying Plaintiff's Motion for Condemnation of Assets* at 24. On June 22, 2000, plaintiff submitted two motions for the Court to issue a Request for International Judicial Assistance pursuant to the Hague Convention on the Taking of Evidence Abroad. In the first motion, plaintiff seeks to depose Abolhassan Bani Sadr, who was president of Iran from 1979 to 1981. Mr. Bani Sadr resides in France. Therefore, in order for plaintiff to depose him, the Court must issue a Request for International Judicial Assistance directed to the Ministry of Justice in France pursuant to the Hague Convention. In the second motion, plaintiff seeks to depose Ahmad Behbahani,

who represents himself as the former director of terrorist operations for Iran. As Mr. Bohbahani resides in the Republic of Turkey, Mr. Flatow seeks a Request for International Judicial Assistance from this Court directed to the Judicial Authority of the Republic of Turkey. BSI apposes Mr. Flatow's motion for issuance of Request for International Judicial Assistance and has filed a motion for a protective order pursuant to Federal Rule of Civil Procedure 26©. For the reasons stated below, the Court declines to issue Requests for International Judicial Assistance to obtain the depositions of Mr. Bani Sadr and Mr. Behbahani and grants BSI's motion for a protective order.

Background

On March 11, 1998, the United States District Court for the District of Columbia entered a default judgment against the Islamic Republic of Iran and in favor of plaintiff Stephen Flatow for $247,513,220.00 in damages for the death of Alisa Flatow. Mr. Flatow registered the judgment in this Court on April 23, 1999. On September 14, 1999, he obtained a writ of execution in the amount of $247,513, 200.00. In this proceeding, Mr. Flatow has requested that the Court ward him funds belonging to Bank Saderat Iran ("BSI") in satisfaction of the default judgment entered against the Islamic Republic of Iran. On February 28, 2000, the Court heard oral argument on the issue of attaching BSI's assets in satisfaction of the judgment against Iran. The Court received briefing from Mr. Flatow, BSI, and the United States.

On May22, 2000, the Court issued an order denying plaintiff's request for condemnation of BSI's assets. The Court found that the presumption that BSI had separate juridical status had not been overcome. See First National City Bank v. Banco Para El Comerico Exterior de Cuba, 462 U.S. 611, 626 (1983). The Court found that, because the Islamic Republic of Iran did not exert day-to-day control over BSI, the bank was not an agency or instrumentality of Iran, and therefore it was improper to attach BSI's assets in satisfaction of a judgment against Iran. Id. However, as Mr. Flatow had requested discovery on the issue of whether Iran exerted sufficient control over BSI, the Court denied without prejudice BSI's motion for release of the funds and permitted the parties to conduct discovery until July 31, 2000

solely on the issue of whether Iran exerts day-to-day control over BSI.

On June 22, 2000, Mr. Flatow filed motions seeking issuance of Letters of Request for International Judicial Assistance in order to depose Mr. Bani Sadr in France and Mr. Behbahani in Turkey. BSI opposes the motions and seeks a protective order from the Court to prohibit the depositions of Mr. Bani Sadr and Mr. Behbahani because they would be an undue burden and expense on BSI. BSI asserts that neither Mr. Bani Sadr not Mr. Behbahani is competent to testify regarding the sole issue that is the subject of discovery: whether the Islamic Republic of Iran exerts sufficient control over BSI for the bank's assets to be attached in satisfaction of the judgment entered against Iran. The Court has reviewed all the papers submitted by the parties.

Discussion

I. Legal Standard

A. Legal Standard for Obtaining Discovery Abroad Pursuant to the Hague Convention

The Hague Convention of March 18, 1970 On The Taking of Evidence Abroad In Civil or Commercial Matters, 28 U.S.C. § 1781 provides procedures for taking discovery in foreign countries. Article 1 states that "[a] Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law." Id. Art. 10. Mr. Flatow seeks issuance of a Letter of Request directed to the French Ministry of Justice to obtain the deposition of Mr. Bani Sadr. The United States and France are both parties to the Hague Convention. See 28 U.S.C. § 1781. Mr. Flatow also seeks issuance of a Letter of Request directed to the Republic of Turkey. However, Mr. Flatow has not shown that Turkey has signed the Hague Convention and Turkey does not appear in the list of signatory nations. See 28 U.S.C. § 1781.

B. Legal Standard for a Protective Order Under Federal Rule of Civil Procedure 26(c)

Under Federal Rule of Civil Procedure 26(c), the Court may issue a protective order "for good cause shown." If the movant has made the proper showing, the Court may issue "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c). The moving party must make a clear showing of a particular and specific need for the order. See Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975). Protective Orders provide a safeguard for parties and other person persons in view of the otherwise broad reach of discovery. See United States v. Columbia Broadcasting System, Inc., 666 F.2d 364, 368-69 (9th Cir. 1982), *cert. denied*, 457 U.S. 1118 (1982). When discovery is sought from third parties, a protective order is more easily obtained. See Dart Industries Co. v. Westwood Chemical Co., 649 F.2d 646, 649 (9th Cir. 1980).

II. Analysis

A. Deposition of Mr. Bani Sadr

The Court has permitted discovery as to the limited issue of whether the Islamic Republic of Iran exerts day-to-day control over BSI. Plaintiff asserts that Mr. Bani Sadr's testimony "will be beneficial to the Court" in resolving this issue because Mr. Bani Sadr was president of Iran from 1979 to 1981 and signed a decree in 1979 that nationalized all Iranian banks. BSI, in response, points out that Mr. Bani Sadr has been exiled from Iran since 1981 and has never been a director or officer of BSI or employed by BSI in any capacity. See *Eliassi Declaration* (Manager of the New York Representative Office of BSI). Therefore, BSI contends that Mr. Bani Sadr does not have knowledge of whether Iran exerts day-to-day control over BSI. Plaintiff has submitted a declaration from Mr. Kenneth Timmerman, who asserts that he has interviewed Mr. Bani Sadr. See *Timmerman Declaration*. According to Mr. Timmerman's declaration, Mr. Bani Sadr "has maintained contracts with persons within Iran and has knowledge from their reports as well as from Iranian Government statements." Id. BSI objects that any information Mr. Bani Sadr may have regarding Iran's control over BSI is from his contacts in Iran and therefore is hearsay.

BSI asserts that the burden and expense of attending a deposition of Mr. Bani Sadr outweighs plaintiff's interest in obtaining discovery from Mr. Bani Sadr, since Mr. Bani Sadr's testimony would be hearsay. BSI requests that the Court issue a protective order pursuant to Federal Rule of Civil Procedure 26(c), ordering that the request deposition of Mr. Bani Sadr not be permitted. The Court agrees the burden and expense that would be incurred by BSI, a non-party to the underlying action pursuant to which Mr. Flatow seeks to recover a default judgment, is greater that the parties' interest in obtaining discovery from an individual who does not have first-hand knowledge of whether Iran exerts day-to day control over BSI. Accordingly, the Court declines to issue a Letter of Request for International Judicial Assistance and finds there is good cause to issue a protective order as requested by BSI as to the deposition of Mr. Bani Sadr.

B. Deposition of Mr. Behbahani

Mr. Flatow requests issuance of a Letter of Request to the republic of Turkey to obtain the deposition of Mr. Behbahani, who resides in Turkey. However, Mr. Flatow has not asserted that turkey is a "Contracting State" to the Hague Convention. Even if Turkey is subject to the provisions of the Hague Convention for the Taking of Evidence Abroad, Mr. Flatow's proposed letter of request reveals that he seeks to depose Mr. Behbahani in order to obtain information outside the limited scope for which the Court permitted discovery in this matter. The proposed Letter of Request submitted to the Court by Mr. Flatow states that Mr. Behbahani's testimony "is necessary in order to determine the extent and nature of holding of the Islamic Republic of Iran in the United States to facilitate collection of the judgment entered." *Proposed Request for International Judicial Assistance* at 2. Mr. Flatow then states in the memorandum in support of issuance of the Letter of Request that, because Mr. Behbahani has represented himself to be the former director of terrorist operations for Iran, "he would have knowledge of the use of Bank Saderat Iran in promotion of terrorist operations and the extent of direction by the Islamic Republic of Iran of the bank." *Memorandum in Support of Request for International Judicial Assistance* at 2.

BSI objects to Mr. Flatow's motion for issuance of a Letter of Request to obtain the deposition of Mr. Behabahani, as plaintiff has not given any indication that Mr. Behbahani would testify regarding whether Iran exerts day-to-day control over BSI. BSI asserts that it would be an undue burden and expense for it to attend Mr. Behbahani's deposition in Turkey and therefore requests that the Court issue a protective order pursuant to Federal Rule of Civil Procedure 26(c), stating that the deposition of Mr. Behbahani will not be allowed to proceed. The Court finds that the burden and expense of attending this deposition outweighs the benefit of obtaining the testimony, since plaintiff's proposed Letter of Request shows an intention to obtain discovery for a different purpose than the one permitted by the Court. Further, plaintiff has not shown that Mr. Behbahani has any knowledge regarding the subject of discovery in this case: the extent of Iran's control over BSI. Accordingly, the Court declines to issue a Letter of Request to obtain Mr. Behbahani's deposition in Turkey, and finds there is good cause to issue a protective order as requested by BSI as to the deposition of Mr. Behbahani.

Conclusion

After careful consideration of the papers submitted by the parties, the facts, and the law, the Court declines to issue Letters if Request for International Judicial Assistance. The Court finds there is good cause for issuance of protective order and orders that the depositions of Mr. Bani Sadr and Mr. Behbahani may not proceed.

IT IS SO ODERED

Dated: June 28, 2000

By {Signature}

MARILYN L. HUFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Steven William Kerekes
Thomas Fortune Fay
Jane Carol Norman

APPENDIX F

United States District Court for the Southern District of California

99-MC-250

Stephen M. Flatow,

Plaintiff,

v.

The Islamic Republic of Iran, et al,

Defendant

ORDER GRANTING RENEWED MOTION BY CLAIMANT BANK SADERAT IRAN FOR RELEASE OF MONEY HELD PURSUANT TO CONSENT ORDER OF OCTOBER 1, 1999 (DOCKET #72) AND TERMINATING CASE

ENTERED ON 8-10-00

On April 23, 1999, plaintiff Mr. Flatow registered in this Court a default judgment awarded to him against the Islamic Republic of Iran in the United States District Court for the District of Columbia. In this proceeding, Mr. Flatow has attempted to execute on assets belonging to Bank Saderat Iran ("BSI") in order to satisfy the judgment against the Islamic Republic of Iran. On September 14, 1999, the plaintiff obtained from this court a writ of execution in the amount of $247,513,220.00 on property in Carlsbad owned by California Land Holding Corporation, a wholly-owned subsidiary of BSI. As California Land Holding Corporation was about to sell the property, Mr. Flatow and BSI agreed that the writ of execution should be released from the property so that escrow could close. Pursuant to a consent order entered on October 1,

1999, the proceeds of the sale are being held in an interest-bearing account subject to the lien created by the writ of execution.

BSI filed its initial motion for release of the money held pursuant to the consent order on November 1, 1999. After extensive briefing by the parties and the United States government, as well as oral argument on whether BSI's assets can be used to satisfy a judgment entered against the Islamic Republic of Iran, the Court issued an order on may 22, 2000, denying without prejudice BSI's motion for release of the funds held pursuant to the consent order. The Court found that the evidence plaintiff presented was not sufficient to overcome the presumption that BSI is a juridical entity separate and apart from the Islamic Republic of Iran and therefore BSI was not subject to execution of the judgment obtained against Iran. See First National City Bank v. Banco Para El Comercio Exterior de Cuba 462 U.S. 611, 626-28 (1983). However, the Court denied without prejudice BSI's motion for release of the funds in order to allow plaintiff to conduct discovery on the limited issued of day to day control over operation of BSI. See *May 22, 2000 Order Denying Plaintiff's Motion for Condemnation of Assets of Judgment-Debtor* at 24. The Court set a hearing date of August 7, 2000 for BSI's renewed motion for release of funds.

The Court allowed plaintiff to pursue discovery until July 31, 2000. BSI filed its renewed motion for release of the money held pursuant to the consent order on July 10, 2000. The Court permitted plaintiff to file a late opposition on August 7, 2000. Plaintiff argues in its opposition that BSI is extensively controlled by the Islamic Republic of Iran, as all Iranian banks were nationalized in 1979. Plaintiff submits as evidence of this control a copy of the Iranian Constitution, which states that banking, as well as insurance, power generation, post, telegraph, and telephone services, as well as other large-scale industries "will be publicly owned and administered by the State." However, this evidence does not show that Iran exerts day to day control over Bank Saderat Iran.

Plaintiff argues even if the Court does not find that Iran exerts day to day control over BSI, plaintiff should be able to execute on assets belonging to BSI in satisfaction of its judgment

against Iran because recognition of BSI's separate corporate status "would work fraud or injustice." See First National City Bank, 462 U.S. at 630. The Court stated in its may 22, 2000 order that in this case, separate entity status was not created in order to shield BSI from liability, and BSI did not participate in the underlying violation of international law; the terrorist act for which plaintiff obtained a default judgment. In Alejandre v. Telefonica Larga Distancia de Puerto Rico, 183 F.2d 1277 (11th Cir. 1999), *reh'g denied*, 205 F.3d 1357 (11th Cir. 1999), the Court recognized the corporate entity's separate juridical status and declined to hold the entity liable for satisfaction of judgments entered against Cuba for terrorist acts. The Eleventh Circuit reversed the district court and stated "[w]e recognize that the district court made an effort to distinguish this case based upon the gravity of the underlying violation of international law. Given the absence of any evidence that ETECSA [corporate entity] was involved in this violation, however, we fail to see how this distinction is relevant to the question of whether ETECSA's separate juridical status should be overcome." Alejandre, 183 F.2d at 1286-87.

As plaintiff has not provided evidence that the Islamic Republic of Iran exerts day to day control over BSI, the Court GRANTS Bank Saderat Iran's motion for release of money held pursuant to the consent order of October 1, 1999, at Comerica Bank, Account No. 1891204974, in the name of California Land Holding Corporation, Escrow Solution as trustee, in the amount of $696,149.59, plus accrued interest. This case is terminated.

IT IS SO ORDERED.

Dated: August 9, 2000

By {Signature}

MARILIN L. HUFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Steven William Kerekes
Thomas Fortune Fay
Jane Carol Norman

APPENDIX G

United States Court of Appeals for the Ninth Circuit

No. 00-56446

Stephen M. Flatow,

Plaintiff,

v.

The Islamic Republic of Iran, et al,

Defendant

December 3, 2001, Argued and Submitted, San Francisco, California

October 23, 2002, Filed

Before BRIGHT, FLETCHER, and FISHER, Circuit Judges.

BRIGHT, Circuit Judge.

Petitioner Stephen M. Flatow appeals the dismissal of his action to levy against California real estate owned by Bank Saderat Iran ("BSI") pursuant to a default judgment entered against the Islamic Republic of Iran by the United States District Court for the District of Columbia. The District Court for the Southern District of California agreed with BSI that the property in question was not an asset of the judgment debtor and therefore released proceeds from the sale of the property and terminated Flatow's action. We affirm the district court.

I. BACKGROUND

On April 9, 1995, Alisa Flatow, an American college student spending a semester studying in Israel, was killed in an

explosion when the bus in which she was traveling collided with a van loaded with explosives. The United States Department of State later concluded that the Shaqiqi faction of the Palestine Islamic Jihad n1 committed the bombing. The State Department also determined that the Islamic Republic of Iran provided material support and resources to the Palestine Islamic Jihad.

Shortly after the bombing, Congress amended the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611, as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), effective April 24, 1996. The Act created an exception to the sovereign immunity of those foreign states officially designated by the Department of State as terrorist states if the foreign state commits a terrorist act, or provides material support and resources to an individual or entity that commits such an act, which results in the death or personal injury of a United States citizen. *See* 28 U.S.C. § 1605(a)(7). Congress also expressly provided that punitive damages be available in actions brought under the state-sponsored terrorism exception to sovereign immunity. *See* 28 U.S.C. § 1605 statutory note. This provision is commonly referred to as the "Flatow Amendment."

Relying upon these new provisions, Stephen M. Flatow, as Alisa's father and executor of her estate, filed a wrongful death complaint against Iran and its officials on February 26, 1997, in the United States District Court for the District of Columbia. On March 11, 1998, the district court entered a default judgment against Iran in favor of Flatow in the amount of $ 247,513,220. *See Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998).

In the instant matter, Flatow registered his judgment with the District Court for the Southern District of California on April 23, 1999. On September 14, 1999, Flatow obtained a writ of execution for $ 247,513,220.00 on property in Carlsbad, California, owned by California Land Holding Company, a wholly-owned subsidiary of BSI. As the California Land Holding Company was about to sell the property, Flatow and BSI agreed that the writ of execution should be released from the property so that escrow could close. Pursuant to a consent order entered on October 1,

1999, the proceeds of the sale were held in an interest-bearing account subject to the lien created by the writ of execution.

BSI filed its initial motion for the release of the money on November 1, 1999. After extensive briefing by the parties and the United States government, as well as oral argument on whether BSI's assets could be used to satisfy a judgment against the Islamic Republic of Iran, the district court issued an order on May 22, 2000, denying without prejudice BSI's motion for release of the funds held pursuant to the consent order. The court found that the evidence Flatow presented was not sufficient to overcome the presumption that BSI is a juridical entity separate and apart from the Islamic Republic of Iran and therefore BSI was not subject to execution of the judgment against Iran. In making this determination, the court relied upon the Supreme Court's *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629, 77 L. Ed. 2d 46, 103 S. Ct. 2591 (1983) (hereinafter "*Bancec*") (holding that unless the entity is found to be "so extensively controlled by [the foreign state] that a relationship of principal and agent is created" or recognizing the entity as separate "would work fraud or injustice," the FSIA does not permit execution upon the entity's assets). However, the court permitted Flatow to conduct discovery on the limited issue of whether Iran exercised day-today control over the operations of BSI.

The court allowed Flatow to pursue discovery until July 31, 2000. BSI then filed its renewed motion for release of the Carlsbad land sale money. Flatow argued in opposition that BSI is "extensively controlled" by Iran because all Iranian banks including BSI were nationalized following the 1979 revolution. Flatow submitted a copy of the Iranian Constitution, which states that banking, as well as insurance, power generation, post, telegraph and telephone services, and other large-scale industries "will be publicly owned and administered by the State." The district court concluded that this evidence did not show that Iran exerts day-to-day control over BSI as required by *Bancec*. 462 U.S. at 629-31. The district court also rejected Flatow's alternative argument under *Bancec's* fraud or injustice exception, *id.*, to the presumption of BSI's status as a separate juridical entity.

During the course of discovery, Flatow requested the assistance of the court under the Hague Convention, 28 U.S.C. § 1781, to take depositions of former Iranian President Bani Sadr, who had been exiled to Paris, France, and former Iranian intelligence operative Ahmad Behbahani, who had been exiled to Turkey. The district court denied this request and entered a protective order under Federal Rule of Civil Procedure 26(c) so that the depositions of Bani Sadr and Behbehani could not proceed.

The district court granted BSI's motion for the release of the money and terminated the case. Flatow timely appeals.

II. STANDARD OF REVIEW

We review the district court's findings of fact for clear error. *See Freeman v. Allstate Life Ins. Co.*, 253 F.3d 533, 536 (9th Cir. 2001); *Troutt v. Colorado Western Ins. Co.*, 246 F.3d 1150, 1156 (9th Cir. 2001). The district court's conclusions of fact are reviewed *de novo. See In re Cybernetic Servs., Inc.*, 252 F.3d 1039, 1045 (9th Cir. 2001); *Troutt*, 246 F.3d at 1156. And we review the grant or denial of a protective order for an abuse of discretion. *See Anderson v. Calderon*, 232 F.3d 1053, 1099 (9th Cir. 2000); *Portland Gen. Elec. Co. v. U.S. Bank Trust Nat'l Ass'n*, 218 F.3d 1085, 1089 (9th Cir. 2000).

III. DISCUSSION

A. Separate Juridical Entity Analysis

In *Bancec*, the Supreme Court clearly stated that the FSIA does not govern substantive liability for foreign states or their instrumentalities. *See* 462 U.S. at 620 ("The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state."). The enumerated exceptions to the FSIA provide the exclusive source of subject matter jurisdiction over civil actions brought against foreign states, *see*

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434-35, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989), but the FSIA does not resolve questions of liability. Questions of liability are addressed by *Bancec*, which examines the circumstances under which a foreign entity can be held substantively liable for the foreign government's judgment debt. This distinction between liability and jurisdiction is crucial to our resolution of this case.

In *Bancec*, the government of Cuba expropriated property from First National City Bank (subsequently known as "Citibank"). Citibank asserted a set-off against the plaintiff Bancec based upon the Cuban government's seizure of Citibank's Cuban assets. 462 U.S. at 616. The Court addressed the issue of whether the acts and liabilities of the foreign sovereign government of Cuba could be attributed to the state-owned banking entity, Bancec.

The Court held that Bancec was not an entity independent from the Cuban government. *Id.* at 633. In making this determination, the Court noted that Bancec had been dissolved and its capital split between a Cuban national bank and the foreign trade enterprises of the Cuban Ministry of Foreign Trade. *Id.* at 632. Furthermore, Bancec was empowered to act as the Cuban government's exclusive agent in foreign trade, the government supplied all of Bancec's capital and owned all of its stock, and all of Bancec's profits were deposited in the General Treasury. Bancec's Governing Board consisted of delegates from Cuban government ministries and the president of Bancec was the Minister of State. *See Bancec*, 462 U.S. at 614. The Court explained, "To hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises." *Id.* at 633.

Nonetheless, under *Bancec*, even though an entity or instrumentality is wholly-owned by a foreign state, that entity is accorded the presumption of independent and separate legal status. *Id.* at 627-28. *Bancec* outlined the features typical of a separate government instrumentality:

A typical government instrumentality, if one can be said to

exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply. *Id.* at 624.

The Court indicated that the presumption of separate juridical status may be overcome in two ways. First, where it can be shown that the "corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other." *Id.* at 629. Second, an instrumentality should not be deemed a separate juridical entity where doing so would work "fraud or injustice." *Id.* Having laid out these two exceptions to the presumption of separate juridical status, the Court declined to provide a "mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded." *Id.* at 633.

Flatow argues that the district court erred in applying *Bancec* and concluding that BSI is a separate juridical entity, which cannot be held liable for Flatow's judgment against Iran. Flatow rests his argument almost entirely upon the contention that the Iranian Constitution, which nationalized the banking industry after the 1979 Iranian revolution, creates a principal-agent relationship between BSI and the Iranian government. Flatow argues that this fact alone demonstrates the control required by *Bancec* to preclude an entity from separate juridical status.

The district court considered and rejected this argument in a thorough, well-reasoned opinion. Specifically, the court concluded that the facts of this case are different from those in *Bancec*. The court found that Flatow had not shown that BSI operates as an arm

of the Iranian government or that BSI's mission is to further the policies of the Iranian government. Additionally, unlike in *Bancec*, BSI is not attempting to use a United States court to recover on a claim while at the same time trying to avoid being the subject of an adversary proceeding. BSI is a nonparty to the underlying case.

In rejecting Flatow's principal-agent argument, the district court also pointed out that BSI is an Iranian corporation, organized under the banking laws of Iran as a banking corporation, but it has its own Articles of Association. BSI was founded in 1952 and until 1979, n14 BSI was a privately owned bank. BSI consists of more than 3000 branch offices throughout the Middle East, London, Paris, Hamburg, and New York. The New York office is the only office BSI has in the United States.

BSI has continued to operate under its own charter as a separate banking entity, and is supervised by a Board of Directors. The Board of Directors consists of a Managing Director, one person from among the BSI staff, and five other recommended individuals. The members of the Board of Directors are elected for three-year terms and may be reelected. The Managing Director holds the highest administrative and executive position and has authority to determine bank policies. The Board of Directors is responsible for, and presides over, the daily activities of BSI.

According to the district court, two governmental entities regulate BSI: the General Assembly of Banks and the High Council of Banks. The General Assembly consists of Iranian government officials and it meets yearly to review the status of banks in Iran. It reviews BSI's annual report, balance sheet, and profit and loss statements. The High Council of Banks n18 has an advisory role to the General Assembly of Banks and meets weekly. The High Council proposes candidates for Iranian banks' boards of directors, including BSI's Board of Directors, and assists in the preparation of regulations, budgets, and reports on banking operations in Iran. The High Council does not involve itself in the day-to-day operations of BSI. The district court credited BSI's assertion that the General Assembly of Banks and the High Council of Banks perform broad policymaking functions like those of the United States Federal

Reserve.

Finally, the district court noted the affidavit of Mohammedreza Moghadasi, the Managing Director of BSI, in which Moghadasi asserts that members of the BSI Board of Directors are all career bankers with extensive experience in finance and banking. He also states that the Board of Directors appoints officers of the bank and oversees the bank's affairs, which include accepting deposits, loan and investment activities, letters of credit, credit collections, and payment order transactions.

Flatow argues that Iran's ownership of BSI's capital precludes BSI from being considered a separate juridical entity under *Bancec*. However, Flatow is incorrect in his belief that this fact alone is determinative. As the Supreme Court recognized in *Bancec*, an entity fully owned by a foreign state is still accorded the presumption that it is a separate juridical entity. *See Bancec*, 462 U.S. at 624 (recognizing that government "appropriations to provide capital or to cover losses" do not prevent a typical government instrumentality from being considered a separate juridical entity); *see also Banco National de Cuba v. Chemical Bank New York Trust Co.*, 782 F.2d 377, 380 (2d Cir. 1986) (concluding that although Banco National was entirely owned by Cuba it was a separate entity from Cuba); *Pravin Banker Assoc. v. Banco Popular del Peru*, 9 F. Supp. 2d 300, 306 (S.D.N.Y. 1998) (analogizing Peru's full ownership of the bank "to the conduct of a majority shareholder" and concluding that state ownership cannot be the sole basis for ignoring the corporate form, especially where the entity was not established in an attempt to shield the assets of Peru). We reject Flatow's argument that the Iranian Constitution and the nationalization of Iranian banks are sufficient to overcome the *Bancec* presumption, and accordingly, we affirm the decision of the district court.

We also affirm the district court's determination that Iran's limited supervision, through the role of the General Assembly of Banks and the High Council, does not constitute day-to-day control sufficient to overcome the separate juridical entity presumption. The government involvement must rise to a higher level. *See, e.g.,*

McKesson Corp. v. Islamic Republic of Iran, 311 U.S. App. D.C. 197, 52 F.3d 346, 351-52 (D.C. Cir. 1995) (concluding that the separate juridical entity presumption was overcome where Iran controlled routine [*1074] business decisions, such as declaring and paying dividends and honoring contracts); *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 616 F. Supp. 660, 666 (W.D. Mich. 1985) (finding day-to-day control where the government required that all checks above a certain amount be signed by a government official, governmental agency was required to approve all invoices for shipment, and the government generally exercised direct control over the instrumentality's operations). The daily affairs of BSI and its 3000 branch offices are overseen by the Board of Directors, consisting of career bankers, the Managing Director, and other bank officers. On this record, the level of economic control exercised by the Iranian government over BSI appears quite limited, and we agree with the district court that Flatow has not shown that the Iranian government is the real beneficiary of BSI's banking operations.

B. Protective Order and Discovery Request

Even though the district court concluded on May 22, 2000, that Iran did not exercise sufficient control over BSI to overcome the *Bancec* presumption, the court allowed the parties to pursue discovery on the matter until July 31, 2000. The sole subject of discovery was: whether the Islamic Republic of Iran exerts sufficient control over BSI for the bank's assets to be attached in satisfaction of the judgment against Iran.

On June 22, 2000, Flatow submitted two motions for the district court to issue a Request for International Judicial Assistance pursuant to the Hague Convention on the Taking of Evidence Abroad. n19 Flatow sought to depose Abolhassan Bani Sadr, who was president of Iran from 1979 to 1981 and now resides in France, and Ahmad Behbahani, who represents himself to be the former director of terrorist operations for Iran and now lives in Turkey. BSI opposed the motions and sought a protective order from the court to prohibit the depositions on the ground that they would be an undue burden on and expense for BSI, and

because neither Bani Sadr nor Behbahani is competent to testify regarding the subject of discovery.

The district court granted BSI's protective order and denied Flatow's request for international assistance in deposing the former Iranian leaders. The court first concluded that the burden and expense of obtaining discovery outweighed Flatow's interest in deposing Bani Sadr, who the district court found has no first-hand knowledge of whether Iran exerts day-to-day control over BSI. Bani Sadr has been exiled from Iran since 1981 and has never been a director or officer of BSI. Secondly, the court explained that Flatow's efforts to depose Behbahani are prohibited by his failure to demonstrate that Turkey, where Behbahani resides, has signed the Hague Convention. Additionally, the information Flatow sought to obtain from Behbahani was outside the scope of the sole issue of discovery. Flatow objects to both of these determinations and makes essentially the same arguments to this court that he made to the district court.

We affirm the district court's decision to grant a protective order under Fed. R. Civ. P. 26(c) that the depositions of Bani Sadr and Behbahani may not proceed. Under that provision, the district court may grant a protective order for "good cause shown," *see* Fed. R. Civ. P. 26(c). In reaching this decision, the court has "extensive control" over the discovery process. *United States v. Columbia Broad. Sys., Inc.*, 666 F.2d 364, 369 (9th Cir. 1982). Flatow has failed to demonstrate that either of these individuals is remotely competent to testify regarding whether the Islamic Republic of Iran exerts sufficient control over BSI for the bank's assets to be attached in satisfaction of his judgment against Iran.

IV. CONCLUSION

This panel joins other courts in expressing regret that its holding forestalls the Flatow family's efforts to execute their judgment against Iran. *See, e.g., Flatow v. Islamic Republic of Iran*, 74 F. Supp. 2d 18, 25-26; *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 27-28. There has, however, been substantial payment of damages through the legislation passed by the United States

Congress. *See supra*, note 6. The government of Iran should pay its debt to the Flatow family, but BSI cannot be held liable for this debt. We follow the clear path set out by the applicable case law. Thus, we AFFIRM the district court.

AFFIRMED